80-1149

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE MARTIN, ET AL,

Petitioners

VS.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION

and

CARRIE L. GRAVES, ET AL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. When, in order to remedy racially segregative attendance assignments in a public school system, a United States District Court has directed the authorities of that school system to put into effect racially integrative attendance assignments as specifically prescribed by the Court, and the school authorities having thereafter done so, and admixtures of races having been fully achieved in each and all of the schools in the exact ratios of race designated by the Court orders — but variances from such racial attendance ratios having subsequently developed in some of the schools, though not by reason of any reoccurrence of official segregative actions — are not the pupils in these schools entitled to constitutional protection against being again reassigned, on account of their race, and compulsorily moved here and there among the schools of this system for the purpose of continually re-creating racial ratios as desired by the District Court or by the school authorities?

2. Do not the decisions of this Court, in *Brown vs. Board of Education* and *Swann vs. Charlotte-Mecklenburg Board of Education* and *Pasadena City Board of Education vs. Spangler,* assure to the school pupils, in this situation, constitutional protection against being repeatedly subjected, because of their race, to such compulsion at the hands of governmental authorities?

LISTING OF ALL THE PARTIES IN THE CASE

The plaintiffs in the case, now Petitioners to this Court, are as follows: — GEORGE MARTIN, for himself

and in behalf of his minor children, ELLEN and CATHERINE MARTIN; MR. and MRS. J. D. WALL, for themselves and in behalf of their minor children, CHRIS and STEVE WALL; JOHN and SUSAN ALDEN, for themselves and in behalf of their minor children, SUZANNE and SCOTT ALDEN; MR. and MRS. RICHARD K. DUNHAM, for themselves and in behalf of their minor children, SCOTT and KRISTIN DUNHAM; MRS. NANCY KATE GORDON, for herself and in behalf of her minor children, ADAM, KERRY, DAWN AND SEHM GORDON; John and PRISCILLA HURLEY, for themselves and in behalf of their minor children, NICOLE and TIFFANY HURLEY; MR. and MRS. JAMES H. JONES, for themselves and in behalf of their minor child, ROBYN JONES; ANDREW C. JOHNSON, for himself and in behalf of his minor children, TRACEY and RANDY JOHNSON; DARRELL and SANDY MYERS, for themselves and in behalf of their minor children, TIFFANY and ZACHARY MYERS; HENRY and JOHANNA L. ASHBAUGH, for themselves and in behalf of their minor children, HENRY and CHANNING ASHBAUGH, MR. and MRS. M. B. CAMPBELL, JR., for themselves and in behalf of their minor children, BINFORD and BRADLEY CAMPBELL; LARRY L. and PHYLLIS C. FALCONE, for themselves and in behalf of their minor children, MICHELLE and MATTHEW FALCONE; MRS. MARLENE BEAVER, for herself and in behalf of her minor child, SUZIE BEAVER; DR. and MRS. EDWARD BONOMO, for themselves and in behalf of their minor child, TRICIA BONOMO; TONY and JUDITH AREY, for themselves and in behalf of their minor children, ASHLEY and BRENT AREY; MRS. PATRICIA M. BOWER, for herself and in behalf of her minor children, SCOTT and

MARK BOWER; THOMAS and EDWINA GIBSON, for themselves and in behalf of their minor children, TRACYE, BRANDY and ASHLEY GIBSON; MR. and MRS. PATRICK DOHERTY, for themselves and in behalf of their minor child, JEFFREY DOHERTY; DON and BETTY ANDERSON, for themselves and in behalf of their minor children, BRIAN and BETH ANDERSON; MRS. BARBARA GROCE, for herself and in behalf of her minor children, HAL, MARTHA and CLARK GROCE; MR. and MRS. JAMES E. TOWNSEND, for themselves and in behalf of their minor child, DONNA TOWNSEND; MR. and MRS. CHARLES GUIDUCCI, for themselves and in behalf of their minor children, KIM and LORI GUIDUCCI; MRS. MARTHA MCWATTERS, for herself and in behalf of her minor children, DARREN and JENNIFER MCWATTERS; TOM and CAROLYN IRVIN, for themselves and in behalf of their minor child, ERIC IRVIN; MR. and MRS. SIMON IYOOB, for themselves and in behalf of their minor children, JOHN and FRANK IYOOB; MR. and MRS. WAYNE KELLY, for themselves and in behalf of their minor child, JEFF KELLY; NEIL and REBECCA MCDUFFIE, for themselves and in behalf of their minor children, KIMBERLY, SHARON and PATTI MCDUFFIE; MRS. CHRISTIE T. CARMER, for herself and in behalf of her minor child, ROBERT ANTHONY CARMER; CARL and JACKIE BINNEY, for themselves and in behalf of their minor children, JASON and MARTY BINNEY; MR. and MRS. ARTHUR TARLETON, for themselves and in behalf of their minor child, ART TARLETON; MR. and MRS. MARC EPSTEIN, for themselves and in behalf of their minor children, KELLY and BRADLEY EPSTEIN; SPENCER and MARILYN GAYLORD, for themselves and in behalf of their minor children, LISA

and DAVID GAYLORD; MR. and MRS. JAMES H. CROPPER, for themselves and in behalf of their minor child, CHERYL CROPPER; WILLIAM and KATHLEEN SHAKE, for themselves and in behalf of their minor children, JULIE and JEFF SHAKE; MR. and MRS. JOE MCCROREY, for themselves and in behalf of their minor children, MARK and JASON MCCROREY; MR. and MRS. T. G. ROCHE, for themselves and in behalf of their minor children, ANNA and GEDDINGS ROCHE; JAMES and ELIZABETH MOORHEAD, for themselves and in behalf of their minor children, DEBBIE and WENDY MOORHEAD; MRS. W. F. MCGINTY, for herself and in behalf of her minor children, MARK and GRETCHEN MCGINTY; ROBERT and KATHRYN SCHLAU, for themselves and in behalf of their minor child, BRIAN SCHLAU; MRS. MARY K. PADEN, for herself and in behalf of her minor child, JAMES PADEN; MR. and MRS. JOHN SHRIVER, JR., for themselves and in behalf of their minor children, SUE and CHRIS SHRIVER; MR. and MRS. RICHARD SHANKLIN, for themselves and in behalf of their minor children, MATHEW and KELLY SHANKLIN; MR. and MRS. GEORGE WIGHTMAN, for themselves and in behalf of their minor children, SHANNON and MICHELLE WIGHTMAN; and MR. and MRS. J. ANDREW WILLIAMS, for themselves and in behalf of their minor children, TODD, PAMELA and ALLISON WILLIAMS.

The defendant in the case is the CHARLOTTE-MECKLENBURG BOARD OF EDUCATION.

Intervenor defendants in the case are as follows: — CARRIE L. GRAVES, on her own behalf and on behalf of

her minor children, CARLA PLATT, GORDON PLATT and LAMONT PLATT; GAYNELL HARRIS GRIER, on her own behalf and on behalf of her minor child, SEBRINA GRIER; ROBERTA S. THOMPSON, on her own behalf and on behalf of her minor children, JAMES L. THOMPSON and LADONNA R. THOMPSON; SARAH R. MASON, on her own behalf and on behalf of her minor children, JACQUELINE DENISE MASON and JADE DAVENE MASON; ELMA ELLISON, on her own behalf and on behalf of her minor children, TARA ELLISON and BRETINSA ELLISON; MABEL JONES, on her own behalf and on behalf of her minor children, JACQUELINE JONES, LESLIE SHARON JONES, ERIC JONES, IRVIN JONES, RAYFORD JONES, JR., and FELECIA JONES.

TABLE OF CONTENTS

	Page No.
OPINIONS OF THE COURTS BELOW	1
JURISDICTION OF THIS COURT	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR THE GRANTING OF A WRIT OF CERTIORARI	8
I. The Central Rulings of *Brown*, Of *Swann* And Of *Pasadena* With Respect To Constitutional Limitation Upon Public School Assignments Based On Race	8
II. Remedial Racial Assignments Were Put Into Effect In The Charlotte-Mecklenburg Schools, Specifically As Ordered By The District Court, And Did Accomplish Corrective Racial Ratios In Each And All Of The Schools, Specifically As Ordered By The Court	11
III. The District Court Insistently Requires Ongoing Racial Ratios In The Charlotte-Mecklenburg Schools And "Continuing Control Over The Race Of Children In Each School"	16

Page No.

IV. The Court of Appeals Has Ruled That, Whether Or Not The District Court Has Exceeded Its Power, The School Board Itself Has Power To Prescribe And Require Racial Ratios In Each And All Of The Charlotte-Mecklenburg Schools 17

V. Summary 22

TABLE OF AUTHORITIES

Cases:

Brown vs. Board of Education, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed 874 (1954) and 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed 1083 (1955)..... 8

Goss Vs. Board of Education, 373 U.S. 683, 83 S. Ct. 1405, 10 L. Ed 2d 632 (1963)..... 15

Pasadena City Board of Education vs. Spangler, 427 U.S. 424, 96 S. Ct. 2697, 49 L. Ed. 2d 599 (1976)..... 8, 11

Shelley Vs. Kraemer, 334 U.S. 1, 68 S. Ct. 836, 92 L. Ed 1161 (1948)..... 24

Swann vs. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed 2d 554 (1971)..... 8

Page No.

Constitutional Provisions:

Fifth Amendment to the Constitution of the United States..... 1

Fourteenth Amendment to the Constitution of the United States..... 2

Statutes:

28 U.S.C. 1254 (1)..... 1

General Statutes of North Carolina, Section 115-176.1..... 2, 20

OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals is published at 626 F. 2d 1165 (4th Cir., 1980), and is also printed in the Appendix to this Petition.

The opinion of the District Court is published at 475 F. Supp. 1318 (W.D.N.C., 1979). The District Court's opinion is lengthy and is therefore set forth in a separate Appendix filed herewith.

JURISDICTION OF THIS COURT

The opinion of the Court of Appeals, embodying its decision and judgment, is dated July 23, 1980, and was entered on that date.

Thereafter, the Petitioners applied to the Court of Appeals for permission to file a Petition for Rehearing. The Court of Appeals granted such request for permission to file Petition for Rehearing, but ruled on the merits against rehearing, on October 14, 1980. The filing of this Petition for Certiorari is within ninety days from the date of such denial of rehearing. *Bowman vs. Loperena*, 311 U.S. 262, 266.

Jurisdiction to review the decision of the Court of Appeals, by writ of certiorari, is conferred on this Court by the provisions of 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"No person . . . shall be . . . deprived of life, liberty or property, without due process of law".

Fifth Amendment to the
Constitution of the United States

"No State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

Fourteenth Amendment to the
Constitution of the United States

"No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. . . . No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin".

General Statutes of North
Carolina, Section 115-176.1

STATEMENT OF THE CASE

This suit was brought by the plaintiffs, who are now Petitioners before this Court, for themselves and in behalf of their minor children, pupils in the schools of the Charlotte-Mecklenburg public school system. The action was instituted in the United States District Court for the Western District of North Carolina, that Court having jurisdiction by reason of the plaintiffs' allegations that they were being deprived of rights assured to them by the Constitution of the United States and by the decisions of this Court.

The plaintiffs asked for injunctive relief, which the District Court, after a hearing, denied. Upon appeal by the plaintiffs, the Court of Appeals affirmed the ruling of the District Court.

In *Swann vs. Charlotte-Mecklenburg Board of Education*[1], this Court upheld findings and conclusions by the same District Court that there had been racially segregative attendance assignments in the Charlotte-Mecklenburg public school system, and that by way of remedy and correction it was proper and appropriate for the District Court to direct that racially integregative assignments be put into effect in these schools.

Although this Court stated in *Swann* that it expressly rejected any concept that the District Court should or could require "any particular degree of racial balance or mixing"[2], the orders of the District Court, both prior and subsequent to this Court's decision, did direct the Charlotte-Mecklenburg school authorities to assign the school pupils in such manner that there would be a "particular degree of racial balance or mixing" of black and white pupils in each of the schools of the Charlotte-Mecklenburg system[3], namely, that there must be blacks assigned to each school, but that blacks must constitute not more than 50 percent of the student body in any school[4].

[1]402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971).

[2]*Swann*, 402 U.S. 1, 24, 28 L. Ed. 2d 554, 571.

[3]Except as to one school, known as "Hidden Valley" which the District Court has all along permitted to be operated with a black enrollment "exceeding 50 percent" of the student body.

[4]The District Court's Orders of February 5, 1970, June 29, 1971, and July 30, 1974, in *Swann* and plaintiffs' Exhibit 1, 428, 454-456, in the present case.

Unless otherwise indicated, all page references in this Petition are to the Joint Appendix filed with the Court of Appeals and transmitted, along with the District Court file, to the Office of the Clerk of this Court.

Both before and after the decision of this Court in *Swann*, the Charlotte-Mecklenburg school authorities instituted various programs of racially integrative pupil assignments in the Charlotte-Mecklenburg schools. The District Court, however, successively found the operation of these programs to be inadequate to the accomplishment of the Court's racial specifications.

In response to the repeated directives of the District Court, the School Board, in 1974, laid before the Court a detailed plan setting forth an exact blueprint as to how many black pupils and how many white pupils would be moved from which schools and to which schools[1], and stating what would be the resulting percentages or ratios of blacks and whites in each of the schools in the system — and projecting that upon the implementation of this program, blacks would be in attendance at each school, but would not exceed 50 per cent of the student body in any school[2]. The Court thereupon ordered that this plan be put into force and effect.

In April of 1975, the School Board filed in the District Court a "Report To The Court" with respect to implementation of this plan and program[3]. The Report stated that "the guidelines and policies as outlined in the plan have been carried out" — that the Board and its staff "working together have shown good faith and

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[1]There are some 105 schools in the Charlotte-Mecklenburg school system.

[2]Plaintiffs' Exhibit 1, 428, 454-456.

[3]Plaintiff's Exhibit 2, 458.

have without exception followed the guidelines" of the plan as ordered by the Court—and that blacks and whites were attending every Charlotte-Mecklenburg school, with blacks constituting not more than 50 per cent of the student body in any school[1].

The School Board thereupon asked for, and the plaintiffs in the *Swann* case agreed to, a "dismissal" of the *Swann* case, and the District Court, on July 11, 1975, directed that "the file" in the *Swann* case "be closed".

Approximately four years after the 1974 program had been put into effect, the School Board reported to the District Court that variances from the District Court's prescribed proportions of black and white pupils had gradually developed, and that the Court's directive that blacks should not constitute more than 50 per cent of the student body in any school was being exceeded in eight schools. With this report, the Board presented a new pupil assignment plan for the school year 1978-79, entitled "Minimal Approach To Reduce Ratios Below 50%"[2]. This plan directed that 4,825 pupils must change schools, thereby altering racial proportions in seventy-six schools[3].

The plan incidentally explained the closing of a "relatively new" school, pointing out that its "trend" was expected to "continue to be one of increasing

[1]Plaintiffs' Exhibit 2, 461, 462, 464, 480-488—again with the exception previously authorized by the Court as to the "Hidden Valley" school.

[2]Plaintiffs' Exhibit 3, 489, et seq.

[3]Plaintiffs' Exhibit 3, 490-508.

ratio[1] and decreasing enrollment", and that therefore it was being shut down[2].

Further, the report to the Court stated that:

"The total black student ratio continues to increase by about one per cent each year and is presently approximately 37%".

. . .

"... [W]e are concerned about many of the changes and more deeply concerned about the direction in which we seem to be headed".

. . .

"With a rising black ratio in the total student population, it becomes increasingly difficult to keep all individual schools below a fixed 50 per cent ceiling".

. . .

"*...[T]o relieve high ratio problems, it becomes necessary to set up long-distance busing or break up large numbers of existing relationships*" (Emphasis in original).

. . .

"The longer we want a ratio adjustment to keep a school under 50 per cent, the lower we must set the initial ratio".

. . .

"A lower initial ratio means more children on the move, and the greater the number of children on the move, the greater the likelihood of long distance busing".

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[1]In all the pupil assignment documents and records, the term "ratio" is uniformly used as meaning the percentage of blacks in a school.

[2]Joint Appendix, 310, Plaintiffs' Exhibit 3, 507.

"The [following is the] most efficient type of adjustment for the type of problem situation here under consideration ('efficient' is used here in the sense of getting the necessary ratio modification with a minimum number of students to be changed)":

"a. If the problem is a combination of high ratio and over-capacity, reassign black students".

"b. If the problem is high ratio and under-utilization, add white students".

"c. If the problem is high ratio and the projected membership is such that the desired ratio reduction cannot be achieved by removing black students (without causing under-utilization), use a combined movement of whites in and blacks out . . ."[1].

Despite the urgent protests of many parents and pupils[2], and the filing of the present suit, this broad program of compulsory school reassignments, for the purpose of again rearranging racial proportions in the schools, was put into effect — and the plaintiffs' plea for an injunction was rejected.

More recently, the School Board has made public announcement that again there are several schools in the Charlotte-Mecklenburg system which are exceeding the prescribed racial ratio; that seventeen other schools are presently in the range of 46 to 50 per cent

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[1]Plaintiffs' Exhibit 3, 509, 510, 512, 513, 514.

[2]For some of whom this was the third time they had been forced to change schools on account of their race. Joint Appendix, 10, 14.

black; and that additional large-scale reassignments of pupils, for purposes of still further racial realignments, are in prospect.

REASONS FOR THE GRANTING OF A WRIT OF CERTIORARI

I.

The Central Rulings Of *Brown*, Of *Swann* And Of *Pasadena* With Respect To Constitutional Limitation Upon Public School Assignments Based on Race

The same public school system which, ten years ago, was the subject of this Court's leading decision in *Swann vs. Charlotte-Mecklenburg Board of Education*[1], is now before this Court again, upon the present Petition for Writ of Certiorari. In brief, the situation is that the directive of "remedial" racial school assignments, which was sustained by this Court in *Swann*, has been obeyed and should now be lifted—as this Court foresaw and projected in *Swann* and explicitly thereafter ruled in the case of *Pasadena City Board of Education vs. Spangler*[2].

The question is no longer whether racial assignments may be required for an "interim" in the Charlotte-Mecklenburg school system, but whether racial assignments and reassignments are to be imposed upon the pupils in these schools on a continuing basis, repeatedly and without end.

It is always to be borne in mind that the basic principle established in *Brown vs. Board of Education*[3]

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[1]402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed 2d 544 (1971).

[2]427 U.S. 424, 96 S. Ct. 2697, 49 L. Ed 2d 599 (1976).

[3]347 U.S. 483, 74 S. Ct. 686, 98 L. Ed 873 (1954) and 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed 1083 (1955).

was that from that time forward admission to public schools must be "on a non-racial basis"[1]. Likewise, it is to be remembered that in *Swann,* this Court emphasized that it was countenancing exception to that fundamental mandate and upholding the District Court's Orders for racial assignments in the Charlotte-Mecklenburg schools only "as an interim corrective measure"[2].

In 1976, this Court firmly applied this "interim" limitation, and specifically struck down continuing racial assignments in a situation paralleling all of the pertinent circumstances of the present case. In that case, *Pasadena City Board of Education vs. Spangler*[3], as in the present case, the school authorities had put into effect "a plan for desegregating" the public schools as required by the District Court[4]. There, as here, the plan provided for pupil attendance assignments that would eliminate all instances of "minority students" constituting "a majority" of the student body in any school[5]. In *Pasadena,* as in the present case, "the initial implementation" of the plan by the District Court, did accomplish the racial proportions which the Court had ordered[6].

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[1]*Brown,* 349 U.S. 294, 301, 99 L. Ed. 1083, 1106.

[2]*Swann,* 402 U.S. 1, 27, 28 L. Ed 2d 554, 573.

[3]*Pasadena City Board of Education vs. Spangler,* 427 U.S. 424, 96 S. Ct. 2697, 49 L. Ed 2d 599 (1976).

[4]*Pasadena,* 427 U.S. 424, 428, 49 L. Ed 2d 599, 604.

[5]Idem.

[6]*Pasadena,* 427 U.S. 424, 436-437, 49 L. Ed 2d 599, 608-609.

Thereafter, however, at each of several schools, in *Pasadena* as in the present case, there gradually developed a "black student enrollment" exceeding "50% of the school's total enrollment"[1]. In *Pasadena,* the number of schools thus varying from the prescribed racial ratio some three years after the achievement thereof, was five out of the thirty-two schools in the system[2]. In Charlotte-Mecklenburg, the number of schools varying from the same prescribed racial ratio, approximately four years after the achievement thereof, was, as hereinabove noted, eight out of the one hundred and five schools in the system[3].

In its *Pasadena* decision, after quoting from its language in *Swann* to the effect that "it does not follow that the communities served by [unitary] systems will remain demographically stable, for in a growing, mobile society, few will do so", this Court then went on to say:

> "It may well be that petitioners have not yet totally achieved the unitary system contemplated by this quotation from Swann ... But that does not undercut the force of the principle underlying the quoted language from Swann. In this case the District Court approved a plan designed to obtain racial neutrality in the attendance of students at Pasadena's

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[1]*Pasadena,* 427 U.S. 424, 431, 433-434, 49 L. Ed 2d 599, 605, 606, 607.

[2]*Pasadena,* 427 U.S. 424, 431, 433-434, 49 L. Ed 2d 599, 605, 606-607.

[3]Plaintiffs' Exhibit 3, 492-508.

public schools. No one disputes that *the initial implementation* of this plan accomplished *that*[1] objective. That being the case, the District Court *was not entitled to require the PUSD to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity.* For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court *had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns*" (emphasis supplied).

Pasadena, 427 U.S. 424, 436-437, 49 L. Ed 2d 599, 608-609

It is respectfully submitted that the application of this ruling, foreseen in *Swann*, and explicitly thus enunciated in *Pasadena*, cannot rightly now be denied to the plaintiffs in the present case.

II.

Remedial Racial Assignments Were Put Into Effect In The Charlotte-Mecklenburg Schools, Specifically As Ordered By The District Court, And Did Accomplish Corrective Racial Ratios In Each And All Of The Schools, Specifically As Ordered By The Court

As has been hereinabove indicated, the 1974 Charlotte-Mecklenburg racial assignment plan and program, as ordered by the District Court, left nothing to generalities. It was controlled by the Court's specific

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[1]Emphasis in original.

directive that blacks should be assigned to each school, but should not constitute more than 50 per cent of the student body in any school. To achieve those specified objectives, however, each step to be taken was also specified — how many blacks and how many whites were to go from what schools and to what schools — and what would be the resulting numbers and percentages of blacks and of whites in each school.

Thus it cannot be denied, and it is not denied, that in this case *the racial assignments and reassignments designated and specified by the District Court were put into effect in the Charlotte-Mecklenburg schools,* and that *the racial ratios prescribed by that Court were thereby brought about in each and all of these schools.*

At the hearing in this case, the Superintendent of the school system testified, on cross examination, that after the making of "pupil assignments" under the "Court requirements of 1974", the Charlotte-Mecklenburg schools "were in compliance with the [racial] ratios required by the Court Order" and that "after the Court requirements were imposed", the "black percentages were less than 50 per cent in all schools except the Hidden Valley school"[1]. Similarly, the Chairman of the defendant School Board, on cross examination, testified that "after the 1974 Court Order" was complied with, "there were no schools in the system higher than 50 per cent black except Hidden Valley"[2].

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[1]Joint Appendix, 352-353, 354.

[2]Joint Appendix, 391.

It will also be remembered that the School Board in 1975 so reported to the Court, and that all parties in *Swann* agreed to a dismissal of the case, and the District Court directed that the file "be closed".

Did there subsequently occur any official segregative actions or omissions which brought about variances from the prescribed and achieved racial ratios? The defendant School Board categorically states in its answer in the present case that "since the adoption of its 1974 pupil assignment plan, it has not committed any segregative acts or omissions whatever"[1]. The Chairman of the School Board, himself a black, testified on cross examination as follows:

> "Q. Under the heading of what are called demographic changes, that is people moving from where they were, families moving, children therefore leaving the schools that they had been attending, other people moving in, shifts in the population, black and white of this nature, was [this] the main thing that caused changes or variations in the black ratio percentages in the schools?
>
> "A. Yes, sir"[2].

Similarly, the Superintendent of the schools, on cross examination, testified:

> "Q. There had been, as you have already testified, I believe, a lot of moving in and moving out of the

[1]Joint Appendix, 13.

[2]Joint Appendix, 392.

attendance areas and out of the various zones that fed pupils into the various schools, and those are called demographic changes, I believe?"

"A. Yes".

. . .

"Q. How is it possible, Doctor, to keep each school in the percentage, anywhere in the percentage of black that you have referred to, if demographic changes, and people moving in and out and around, result in the black ratio rising? How are you going to keep the schools, some schools, from rising . . ."?

"A. Using the same methods we've been using, I assume"[1].

The "same methods" of course means that which is here challenged, namely, the continual moving of pupils, according to their race, around and about among the schools, so as to re-establish and maintain perpetually in each and all schools a prescribed racial ratio. Against that, however, this Court has taken its stand, in *Brown,* in *Swann* and in *Pasadena.*

However, the District Court, in its decision, turns away from the obvious and unavoidable realities of demographic change. The Court suggests, for example, that if school buildings were differently located, in relation to the residences of pupils, that might prevent the development of changes in the racial ratios in the schools. In fact, however, that there is no method of

[1]Joint Appendix, 355, 380.

selecting school building locations that will assure against changes in racial ratios among the pupils. For example, statistical exhibits in evidence in this case show that of eighteen Charlotte-Mecklenburg schools built in predominantly black residential areas, only two have ever exceeded the 50 per cent ratio limitation on black enrollment — whereas seven schools built in predominantly white residential areas have exceeded the 50 per cent ratio limitation on black enrollment.

The District Court further declares that the Board's allowing of too many individual transfers of pupils, from one school to another, is a major factor in causing variances from prescribed racial ratios. The Court accepts, however, the testimony of the Chairman of the School Board that the great bulk of such transfers are the result of "residential changes". Yet the Court insists that if a transfer of a pupil would tend to affect "adversely" the racial ratio in a school, then the pupil shall not be allowed to transfer to another school — no matter that the pupil's residence has changed so that his transfer to the other school is completely justified. Such position is, however, permeated with the same fallacy as the concept that a dictated racial ratio, achieved by compulsory assignments according to race, must be forever maintained by additional and continuing racial assignments.

> "Classifications based on race for purposes of transfer between public schools, as here, violate the Equal Protection Clause of the Fourteenth Amendment".
>
> *Goss vs. Board of Education*,
> 373 U.S. 683, 687, 83 S. Ct.
> 1405, 10 L. Ed 2d 632, 635 (1963)

A still further proposition, put forward by the District Court's decision, is that to "some" extent, unstated and unknown, the racial reassignments here in question had purposes that were not racial, such as the accomplishing of improved utilization of an over-utilized or an under-utilized school. Yet, among the thousands of pupils who were reassigned, neither the Court nor the defendants pointed to any instance in which a pupil would have been reassigned had he been of a different race.

III.

The District Court Insistently Requires Ongoing Racial Ratios In The Charlotte-Mecklenburg Schools And "Continuing Control Over The Race Of Children In Each School"

The District Court does not by any means accept the limited "interim corrective" concept of racial school assignments. Both before and since this Court's decision in *Swann*, the District Court has repeatedly ordered in the Charlotte-Mecklenburg school system:

> "That the defendants *maintain a continuing control over the race of children in each school*, such as was done for many decades before *Brown vs. Board of Education*, and maintain the make-up of each school (including any new and any re-opened schools) to prevent any school from becoming racially identifiable" (emphasis added).
>
> . . .
>
> "That no school be operated with predominantly black student body".
>
> . . .

"The defendants are enjoined and restrained from operating any school for any portion of a school year with a predominantly black student body"[1].

This is not only a requirement, but is also an ongoing and permanent requirement, of a "particular degree of racial balance or mixing" which this Court in *Swann* "disapproved" and forewarned that it "would be obliged to reverse"[2]. It is precisely the sort of "in perpetuity" requirement which this Court thereafter, in *Pasadena*, did reverse.

IV.

The Court Of Appeals Has Ruled That, Whether Or Not The District Court Has Exceeded Its Power, The School Board Itself Has Power To Prescribe And Require Racial Ratios In Each And All Of The Charlotte-Mecklenburg Schools

Although the matters hereinabove outlined are the heart of this controversy, the Court of Appeals did not rule upon them. Instead, the plaintiffs' plea for constitutional protection against being reassigned from school to school because of their race, was rejected by the Court of Appeals entirely upon an "alternative" ground, namely, that the decision to impose the challenged racial reassignments "was reached independently and without regard to Court intervention and constituted a valid exercise of the Board's power over

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[1]District Court's Orders of February 5, 1970, June 29, 1971, and July 30, 1974, in *Swann*.

[2]*Swann*, 402 U.S. 1, 24, 28 L. Ed 2d 554, 571.

educational policy"[1]. "The School Board", said the Court of Appeals, "is vested with broad discretionary powers over educational policy and is well within its powers when it decides that as a matter of policy schools should not have a majority of minority students"[2].

It is to be noted that this pronouncement is not in any way limited to a situation, as in *Swann*, calling for or justifying "remedial" or "corrective" racial assignments. Nor has the Court of Appeals in any sense determined or ruled that such a situation presently exists in the Charlotte-Mecklenburg schools.

The broad proposition enunicated by the Court of Appeals is that since a school board has "discretionary powers over educational policy", therefore it may at any time, in the exercise of its discretion, put into effect programs under which pupils shall be assigned according to race, so as to create specified ratios of race in each and all of the schools under its jurisdiction.

There is, however, a fundamental fallacy in this proposition. It renders a school board — by virtue of its "educational policy" discretion — immune to the central mandate of *Brown*. As has been hereinabove emphasized, that mandate is that assignments to public schools shall be "on a non-racial basis". Yet the Court of Appeals' pronouncement is that a school board, though it is a governmental agency as truly as

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[1]Appendix to this Petition, p. 3a

[2]Idem., p. 5a

a court, may in its discretion do at any time what a court can do only in a *Swann* "remedial" situation, namely, assign pupils to public schools on a racial basis.

Indeed, the defendant School Board, like most school boards, is an agency of state government, and as such is directly and specifically subject to the interdiction of the United States Constitution's Fourteenth Amendment, the fundamental authority on which *Brown* rests.

There is further irony in the Court of Appeals' holding that the defendant School Board can in its "educational policy" discretion make racial school assignments — even though the Court of Appeals, as it clearly states, has made no determination that there is here a "remedial" situation requiring or supporting such racial assignments. If the School Board — even in the absence of a *Swann* remedial situation — is immune to the *Brown* mandate that school assignments shall be made "on a non-racial basis", then the Board, or a successor Board, could some day arrive at a genuinely considered decision that "educational policy" would be wisely and beneficially served by making racial assignments upon ratios such as would tend greatly to diminish or eliminate racial integration in the school system.

Logically, such could certainly be a consequence of this concept that even though *Brown* prohibits racial ratio school assignments, a school board may never-

theless make racial ratio assignments as and when it sees fit, if in doing so it is acting upon "educational policy". The Petitioners respectfully submit, to the contrary, that under the non-racial mandate of *Brown*—except when a *Swann* "remedial" situation exists—no governmental authority, including a school board, has discretion, whether in the advancement of "educational policy" or otherwise, to make public school assignments on the basis of selections according to race.

There is yet another paradox in the declaration that whether a *Swann* "remedial" situation exists or not, the defendant School Board nevertheless has "educational policy" discretion to make school assignments on a racial basis. The Charlotte-Mecklenburg School Board, as pointed out above, is an agency of the State of North Carolina. North Carolina has a statute which provides that:

> "No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin".
>
> "... No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin ... "
>
> General Statutes of North Carolina
> Section 115-176.1

These North Carolina statutory provisions are obviously in harmony with the "non-racial" mandate of

Brown. However, just as "interim" exception is made to the *Brown* non-racial mandate in a *Swann* "remedial" situation, likewise a *Swann* "remedial" situation prevails over the "non-racial" mandate of North Carolina Statute.

Since, however, a *Swann* "remedial" situation requiring corrective racial assignments does not now exist in the Charlotte-Mecklenburg schools—as the record in this case specifically and conclusively shows and as the Court of Appeals does not question—therefore the "non-racial" mandate of this North Carolina Statute, paralleling the "non-racial" mandate of *Brown,* is in full force and effect and prohibits racial assignments. In other words, it is an obvious self-contradiction to say that the Charlotte-Mecklenburg School Board, a creature of North Carolina Statute, can exercise an "educational policy" or "discretion" directly contrary to the mandate of North Carolina Statute—in circumstances where there is no *Swann* "remedial" situation, and where the North Carolina Statute and its model, the *Brown* mandate, are consequently in full force and effect[1].

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[1]It will surely be agreed that the comment in *Swann*—to the effect that "school authorities are traditionally charged with broad power to formulate and implement educational policy", 402 U.S. 1, 16, 28 L. Ed 2d 554, 566, which might enable such school authorities to prescribe racial ratio in their schools as they see fit—could hardly be applicable where the school authorities are directly "charged" to the contrary by a State Statute which is now and in the present situation lawfully in force and effect.

V.

Summary

In dealing with a case such as this, it is absolutely necessary to recognize the compulsions which are in fact imposed in racial school assignments. For example, in *Swann,* when the same schools were before the Court as in the present case, this Court emphasized that:

> "Our objective in dealing with the issues presented in these cases is to see that school authorities exclude no pupils of a racial minority from any school, directly or indirectly, on account of race . . . "[1]

Yet that very objective was repudiated and violated on a wholesale basis in the racial reassignments which are the subject of the present suit. As has been hereinabove noted, 4,825 pupils were involved in the reassignments now at issue, altering the racial proportions in seventy-six of the Charlotte-Mecklenburg schools. Of these 4,825 pupils, 2,775 were black and 2,050 were white[2].

It is essential to understand that racial assignments, to achieve or re-achieve specified racial ratios among school pupils, involve compulsions upon both black and white pupils. Such assignments inevitably involve the excluding of various numbers of children, black

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[1]*Swann,* 402 U.S. 1, 23, 28 L. Ed 2d 554, 570.

[2]Plaintiffs' Exhibit 3, 490.

and white, from some schools, "on account of race"—and the sending of various numbers of them, black and white, to other schools, "on account of race".

Under the reassignment program here at issue, the necessary meaning of the compulsion imposed upon each of thousands of pupils, black and white, is this:

> "Although you are otherwise qualified to attend this school where you have been attending or wish to attend, and although you would be allowed to attend here now were it not for your race, in order to alter the racial ratio in this school there should be less pupils of your race here—and in order to alter the racial ratio in another school there should be more pupils of your race there. Consequently, because of your race, you are excluded and barred from this school, and because of your race you are assigned to another school, and there you must go".

The whole situation and sequence thus stands in clear and stark relief. To bar a pupil from a school because of his race—or to compel him to go to another school because of his race—cannot be squared with the landmark decision in *Brown*, namely, that assignments to public schools must be "on a non-racial basis". Under *Brown* this right not to be barred from a school because of race nor sent to another school because of race is a constitutional right, derived from the Fourteenth Amendment to the United States Constitution and belongs to the individual pupil.

> "The rights created by the First Section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights".
>
> *Shelly vs. Kraemer*, 334 U.S. 1, 22, 68 S. Ct. 836, 92 L. Ed 1161, 1185 (1948)

Swann did establish that this constitutional right could be suspended, but only for an "interim", while racially integrative assignments are being made "in correction" of earlier racially segregative assignments.

Pasadena enforced this "interim" limitation, specifically holding that once corrective racial assignments had been put into effect as ordered, then further and continuing racial assignments are constitutionally invalid.

In the present case, involving the same schools which were before the Court in *Swann*, it cannot be denied that racial "interim" assignments have been put into effect specifically as prescribed by District Court Orders.

Nevertheless, racial reassignments are again being imposed upon Charlotte-Mecklenburg public school pupils, including the plaintiff pupils — the District Court adhering to the erroneous concept, and the defendant School Board apparently acquiescing there-

in, that the school authorities must "maintain a continuing control over the race of children in each school ... and maintain the racial make-up of each school" and are "enjoined and restrained from operating any school for any portion of a school year with a predominantly black student body" — indefinitely and without end.

In such state of affairs, the plaintiffs are, by the supreme law of this land, entitled to protection against being thus compulsorily barred from schools, *because of their race*, or compulsorily assigned to other schools, *because of their race.*

It is firmly established as a fundamental precept of our constitutional law that government and governmental agencies, whether state or federal, shall place no restriction and no requirement upon any person because of his or her race. The plea now to this Court is that the promised and assured protection of that basic principle be no longer denied to these Petitioners.

Respectfully submitted,

WHITEFORD S. BLAKENEY
Attorney for the Petitioners

APPENDIX

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

NO. 79-1586

George Martin, for himself and in behalf of his minor children, Ellen and Catherine Martin, et al.,

Appellants,

VERSUS

Charlotte-Mecklenburg Board of Education, et al.,

Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge.

Argued May 5, 1980. Decided July 23, 1980

Before HAYNSWORTH, Chief Judge, BUTZNER and PHILLIPS, Circuit Judges.

Whiteford S. Blakeney (Blakeney, Alexander & Machen on brief) for Appellant; William W. Sturges (Hugh B. Campbell, Jr., Weinstein, Sturges, Odom, Bigger, Jonas & Campbell, P.A. on brief) and Julius L. Chambers (Karl Adkins, Chambers, Stein, Ferguson & Becton, P.A. on brief) for Appellee.

PHILLIPS, Circuit Judge:

Plaintiffs brought this suit for themselves and their children, students in the Charlotte-Mecklenburg school system, seeking to enjoin the Board of Education from implementing the Board's 1978 pupil reassignment plan. The district court denied plaintiffs' prayer for a temporary restraining order and an injunction, and this appeal followed. Concluding that the 1978 assignment plan is within the Board's plenary powers over educational policy, we affirm.

I

In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the Supreme Court upheld a series of orders by the district court designed to implement desegregation of the Charlotte-Mecklenburg school system. In 1974 the School Board and a citizens group submitted a proposal for student reassignment to the district court. The proposed assignments were intended to result in no school with a majority of minority students (with one exception), and the proposal called for review and adjustment of pupil assignments every third year. The district court adopted the joint proposal and in 1975 removed the case from the active docket noting that existing orders continued in full force and effect. In 1978 the Board reviewed pupil assignments and reassigned 2,050 white and 2,775 black students out of approximately 78,000 students in the system. Plaintiffs sought to enjoin implementation of the 1978 plan on the theory that reassignments made to achieve a particular racial ratio violated their right to equal protection under the four-

teenth amendment. Plaintiffs argued below that *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*); 349 U.S. 294 (1955), mandates that assignments to schools be made on a nonracial basis and that under *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976), the 1978 plan was invalid because a racially neutral attendance pattern was achieved in 1974. The district court held that a racially neutral attendance pattern had never been achieved and that certain of defendant's policies, including construction and school closing decisions, and a transfer procedure that was inadequately monitored, contributed to segregation. In the alternative the district court held that the Board's decision to adopt the 1978 plan was reached independently and without regard to court intervention and constituted a valid exercise of the Board's power over educational policy.

II

When an unconstitutionally segregated school system prohibited under *Brown I* exists, the school authorities are under an affirmative obligation to dismantle the dual system. If the school authorities default in their obligation, the "district court has broad power to fashion a remedy that will assure a unitary school system." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. at 16. When the system achieves compliance with *Brown I*, further judicial supervision over the school system is unnecessary unless school authorities deliberately attempt to segregate the schools by altering attendance patterns. *Id.* at 31-32. The school system in *Pasadena* was found to be

unconstitutionally segregated in 1970, and the district court enjoined the school board to assign students in such a manner that no school would have a majority of minority students. The board complied with the order and reassigned students to achieve racial balance. In 1974 the school board sought relief from the requirement that no school have a majority of minority students, but the district court refused to modify its injunction. The Supreme Court reversed and held that *Swann* limited judicial remedial power to cases in which the school authorities have caused segregation. 427 U.S. at 434. In *Pasadena* there was no showing that the post-1970 changes in the racial composition of the schools were caused by the Board's actions. After racial neutrality in attendance patterns was achieved in 1970, the district court could not require yearly adjustment of student assignments to ensure racial balance. *Id.* at 435-37. The school board was, therefore, entitled to relief from the injunction to the extent that the order required alteration of attendance zones. *Id.* at 440.

Plaintiffs urge on this appeal that *Pasadena* prohibits the reassignment made in 1978. We conclude, however, that *Pasadena* is inapposite. The maintenance of the 50% limitation on minority assignments was admittedly a large factor in the Board's decision to reassign students in 1978. The 50% requirement is embodied in the joint proposal adopted by the district court in 1974, but the Board independently decided in 1978 to adhere to its commitment under the 1974 proposal. The district court did not intervene to coerce

the reassignments, and the Board did not seek to be relieved of any outstanding order of the district court.

For these reasons *Pasadena* is inapplicable, and the validity of the Board's decision to reassign students in order to maintain racial ratios must be evaluated under principles enunciated in *Swann*. The School Board is vested with broad discretionary powers over educational policy and is well within its powers when it decides that as a matter of policy schools should not have a majority of minority students. *See Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. at 16. The assignments made in 1978 were well within the plenary powers of the Board.

Because we conclude that the 1978 assignment plan was a valid exercise of the Board's powers, we do not address the alternate holding relied on by the district court. The judgment of the district court is affirmed.

AFFIRMED.

80-1149

Supreme Court, U.S.
FILED
JAN 10 1981
MICHAEL RODAK, JR., CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE MARTIN, ET AL, *Petitioners*

vs.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION

and

CARRIE L. GRAVES, ET AL

SEPARATE APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE DISTRICT COURT OF THE
UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH
CAROLINA

GEORGE MARTIN, ET AL,
Plaintiffs

vs.

CHARLOTTE-MECKLENBURG
BOARD OF EDUCATION,
Defendant

and

CARRIE L. GRAVES, ET AL,
Added and Intervening
Defendants

Before James B. McMillan, District Judge

Mr. Whiteford S. Blakeney, Blakeney, Alexander & Machen, 3450 NCNB Plaza, Charlotte, North Carolina 28280, counsel for plaintiffs.

Mr. Hugh B. Campbell, Jr., Weinstein, Sturges, Odom, Bigger, Jonas & Campbell, P.A., 810 Baxter Street, Charlotte, North Carolina 28202, counsel for defendant Charlotte-Mecklenburg Board of Education.

Mr. Julius LeVonne Chambers, Chambers, Stein, Ferguson & Becton, Suite 730, 951 S. Independence Boulevard, Charlotte, North Carolina 28202, counsel for added and intervening defendants.

I.
SUMMARY OF DECISION

Plaintiffs, a group of parents and children, brought this suit against the Charlotte-Mecklenburg, North Carolina, Board of Education, seeking an order prohibiting the Board from assigning pupils pursuant to the Board's 1978 pupil assignment plan. Under that plan, 2,050 white and 2,775 black children (out of approximately 78,000) were reassigned. One reason for many of these transfers was to prevent re-segregation of certain schools. Plaintiffs allege that race was the significant element, or at least a major element, in those assignments; that racial discrimination had ceased with the adoption and implementation of the pupil assignment plan of 1974; and that race could not be lawfully considered for any purpose thereafter.

The pupil assignment plan under attack was adopted pursuant to orders of this court originally affirmed by Swann v. Charlotte-Mecklenburg, 402 U.S. 1 (1971) and orders later based upon that decision, and in accordance with independent policy decisions by the School Board itself that it would maintain and operate a desegregated school system. In arriving at those decisions the School Board expressly considered numerous policy matters including quality education for all students (the "main goal"); desegregated schools as a necessary part of that goal; grade structures and specialized schools appropriate to educational needs; the lack of planning among the "feeder areas" of the system; the need for coordination with other community planning agencies; the

problems of those schools whose student bodies are almost all economically deprived; parental preferences; student safety; the desire to recognize "neighborhood" in school assignments when possible; the most economical use of school property and facilities, including transportation; and the Board's educational policy that regardless of what previous Boards might have done, and independent of court orders, this Board considered it educationally desirable to have the races represented in the various schools in the proportions produced by the 1978 plan.

The School Board vigorously defended its actions, ably asserting its contentions based upon numerous essential facts including those briefly stated above. It pointed out that no student is denied the

opportunity to go to school in this community because of race or any other invidious classification; that the Board is making a serious effort to provide substantially equal opportunity at all schools; that these facts are materially different from Bakke because unlike Bakke nobody has been turned away from the schoolhouse door; and that

> "[only] [w]hen a classification denies an individual opportunities or benefits enjoyed by others solely because of his race or ethnic background, it must be regarded as [constitutionally] suspect."

University of California Regents v. Bakke, 438 U.S. 265, 305 (1978).

Carrie Graves and others sought permission to intervene and were allowed to intervene as defendants on behalf of themselves and a class of black pupils attending or eligible to attend the Charlotte-

Mecklenburg schools. They are represented by the attorneys who represented Swann and the other plaintiffs in the original Swann case. They oppose the contentions of plaintiffs here.

This is the third suit filed by the same lawyers seeking to nullify Swann. The first such case, Moore, et al v. Charlotte-Mecklenburg Board of Education, was filed February 27, 1970, attacking the court's rulings in Swann because North Carolina had a "no bussing" law. A few weeks later a three-judge court held unconstitutional the North Carolina statute prohibiting "bussing" and assignment of pupils by race. On April 20, 1971, contemporaneously with its principal Swann decision, the United States Supreme Court held North Carolina's "anti-bussing law" unconstitutional, North

Carolina State Board of Education v. Swann, et al.,402 U.S.43, and dismissed the Moore case, Moore, et al v. Charlotte-Mecklenburg Board of Education, et al.,402 U.S. 47 (April 20, 1971). The second case, Cuthbertson, et al v. Charlotte-Mecklenburg Board of Education, was filed on March 29, 1973, and was dismissed by order dated July 30, 1975. It was appealed to the Fourth Circuit Court of Appeals, which dismissed without opinion on March 18, 1976 (535 F.2d 1249). On October 4, 1976, the Supreme Court denied petition for certiorari. 429 U.S. 831. The factual contentions in that case were much the same as those in the case at bar, and the issues are much the same as those decided in the original Swann case. Res judicata, laches and collateral estoppel are pleaded, perhaps with merit, by the intervening defendants.

However, since these plaintiffs today contend that any consideration of race in pupil assignment in the Charlotte-Mecklenburg schools is unlawful under Bakke, supra, and under Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976), it becomes the duty of the court to consider plaintiffs' claims in light of Brown v. Board of Education, 347 U.S. 483 (1954), Swann, Pasadena and Bakke. There is no way to do this without a factual survey of the Charlotte-Mecklenburg schools and how they got where they are, and why the Board considers race, among other factors, in pupil assignment.

For that purpose, two hearings were conducted and much research was done. The first hearing was a preliminary conference with counsel, and the second was a two-day evidentiary hearing. Few plaintiffs appeared; no plaintiff testified; plaintiffs

offered no live evidence but offered and relied upon a few written exhibits and admissions from the pleadings. Defendant School Board and the intervening "Swann" defendants (Carrie Graves and others) offered exhibits and lengthy testimony. I have also re-examined and considered the hundreds of pages of findings of fact and orders from the original Swann case, most of which are reported in the Federal Supplement and Supreme Court reports.

From that survey and from Brown, Swann, Pasadena and Bakke, I have concluded that the challenged actions of the School Board are thoroughly within constitutional limits and should be upheld.

II.
THE THEORY OF THE PLAINTIFFS

Plaintiffs concede that after Brown v. Board of Education (1954), the Charlotte-

Mecklenburg schools were unlawfully segregated. They say, however, that in 1974, after five years of heated litigation, the School Board adopted a pupil assignment plan which has been implemented according to its terms; that its terms call for elimination of all segregation - and establishment of neutral pupil assignment patterns; and that from some time during or shortly after the adoption of that plan in 1974, the local schools have been "unitary", and that thereafter assignment of pupils may not take race into account. Plaintiffs rely principally upon Bakke and Pasadena, cited above.

In Pasadena, the plaintiff was the local school board itself. The board sought relief from a district court order four years old which, to eliminate segregation,

had required that "there shall be no school in the district . . . with a majority of any minority students," 427 U.S. at 428 (quoting 311 F. Supp. 501, 505 (C.D.Cal. 1970)). Mr. Justice Rehnquist wrote for the Supreme Court. He took note of the trial judge's statement that his 1970 order "meant to me that at least during my life time there would be no majority of any minority in any school in Pasadena," 427 U.S. at 433. He read the district judge's statement as a belief that he "had authority to impose this requirement even though subsequent changes in the racial mix in the Pasadena schools might be caused by factors for which the defendants could not be considered responsible." Id. at 434. He took note of the stipulation of counsel that the pupil assignment plan had been

implemented in 1970 and had been found by the trial judge to be "in conformance with the judgment entered herein January 23, 1970." In addition, he treated the case as one in which the board had "implemented a racially netural attendance pattern in order to remedy the perceived constitutional violations . . . ." 427 U.S. at 436-37 (emphasis added).

The decision in Pasadena is consistent with the Supreme Court's ruling in Swann, supra, with regard to the scope and duration of the district court's remedial authority. The Swann court stated:

> "The objective today remains to eliminate from the public schools all vestiges of state-imposed segregation. Segregation was the evil struck down by Brown I as contrary to the equal protection guarantees of the Constitution. That was the violation sought to be corrected by the remedial measures of Brown II. That was the basis for the holding in Green that

school authorities are 'clearly charged with the affirmative duty to take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch.' 391 U.S., at 437-438.

"If school authorities fail in their affirmative obligations under these holdings, judicial authority may be invoked. Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.

***

". . . However, a school desegregation case does not differ fundamentally from other cases involving the framing of equitable remedies to repair the denial of a constitutional right. The task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution.

***

". . . In default by the school authorities of their obligation to proffer acceptable remedies, a district court has broad power to fashion a remedy that will assure a unitary school system."

402 U.S. 1, at 15-16 (1971) (emphasis added).

In that same opinion, the Court generally defined the boundaries of remedial action:

> "It does not follow that the communities served by such systems will remain demographically stable, for in a growing, mobile society, few will do so. Neither school authorities nor district courts are constitutionally required to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system. This does not mean that federal courts are without power to deal with future problems; but in the absence of a showing that either the school authorities or some other agency of the State has deliberately attempted to fix or alter demographic patterns to affect the racial composition of the schools, further intervention by a district court should not be necessary."

Id. at 31-32 (emphasis added).

In his opinion in Pasadena, Justice Rehnquist suggested that, in some circumstances, specific types of remedial

action, in the face of school board opposition, are unauthorized notwithstanding that a unitary system has not in all respects been achieved at the time the remedial action is taken:

> "It may well be that petitioners have not yet totally achieved the unitary system contemplated by . . . Swann. There has been, for example, dispute as to petitioners' compliance with those portions of the plan specifying procedures for hiring and promoting teachers and administrators. . . . But that does not undercut the force of the principle underlying the . . . language from Swann. In this case the District Court approved a plan designed to obtain racial neutrality in the attendance of students at Pasadena's public schools. No one disputes that the initial implementation of this plan accomplished that [sic] objective. That being the case, the District Court was not entitled to require the PUSD to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity."

Pasadena, supra at 436 (additional emphasis added).

Justice Rehnquist clarifies this language somewhat in a later passage:

> ". . . For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns."

Pasadena, supra at 437 (emphasis added).

The Pasadena opinion thus impliedly recognizes that school desegregation orders may deal with distinct and separable elements of a school operation. If those various elements are truly independent, then it is possible that a school board may achieve compliance as to some elements with some orders sooner than with others. It would then appear that a court might be required to continue remedial orders as to independently discriminatory elements but

to discontinue such orders as to independent non-discriminatory elements.

Whether any two or more facets of a school operation are interdependent or independent is, of course, a question of fact. If they are dependent upon each other, then all such facets are subject to continuing remedial orders, until discrimination has been eliminated with respect to those and all other facets of school operation with which they share a mutual dependency. See, e.g., Brown v. Board of Education, 349 U.S. 294, 300, quoted in Swann, supra, 402 U.S. at 12-13 ("To effectuate this interest may call for elimination of a variety of obstacles in making the transition to school systems operated in accordance with . . . constitutional principles . . . ."); Swann,

supra at 20-21 (express recognition of the interrelation of school placement and patterns of residential development) and 14 (express recognition that patterns of residential development, as well as other community changes, have the capacity of "neutralizing or negating remedial action before it [is] fully implemented"); cf., Pasadena, supra at 435 (holding of Pasadena not applicable to implementation of later steps in primary, step-by-step desegregation plan), 436 (no dispute as to fact of prior complete implementation of school attendance plan).

Therefore, in determining whether plaintiffs have made out their claim for injunctive relief under Pasadena (assuming, for purpose of discussion, that Pasadena applies), the court must determine which aspects of its remedial orders in Swann were independent, as well as which aspects were implemented in fact.

III.
RELEVANT HISTORY OF THE CHARLOTTE-MECKLENBURG SCHOOLS - A GENERAL SUMMARY

Before Brown (1954) the Charlotte-Mecklenburg schools were totally segregated in law and fact. - For three centuries racial segregation was the law of the land. North Carolina, like many other states, had and enforced laws requiring racial segregation in almost all public (and many private) facilities, accommodations and activities, including, among others, schools, colleges, orphanages, medical facilities, prisons and other detention facilities, theaters, busses, trains, restaurants, restrooms, water fountains, tax records, housing, financing of housing, zoning, weddings and burials. A seventeen-page fine-print collection of such laws appears in the Swann order of August 3, 1970, reported in 318 F. Supp.

786, 804-820. School segregation, accelerated by the tragic "separate but equal" error of the Supreme Court in Plessy v. Ferguson, 163 U.S. 537 (1896), was the law of the land throughout the south and some other areas. In North Carolina segregated schools were rigidly maintained up to Brown (1954), and were substantially maintained thereafter. See Swann v. Charlotte-Mecklenburg Board of Education, 300 F.Supp. 1358 (W.D.N.C. 1969)

Unlawful segregation continued long after the Brown decision. -- This was the essential finding of this court's order of April 23, 1969, 300 F.Supp. 1358. Such segregation had continued after Brown and had not been substantially remedied by the actions of the defendants pursuant to the 1965 order of then district judge J.

Braxton Craven, Jr., approving a limited "school closing" "desegregation" plan.

A motion for further relief was filed in September 1968 in the Swann case. Lengthy evidence was taken and volumes of exhibits were received (virtually all from School Board and other public records) on the state of the Charlotte-Mecklenburg schools and how they got that way.

From the evidence the court concluded that segregation of schools, like the segregation of housing and other activities, was the result of the combined actions of many generations of federal, state, and local governments (including school authorities), and that school segregation was inseparable from the legally legislated and legally financed segregation of residences and discriminatory location of

schools. Part of that history was summarized in the Swann order of April 23, 1969:

> "... Charlotte (270,000-plus) sits in the center of Mecklenburg County (550 square miles, total population over 335,000). The central city may be likened to an automobile hub cap, the perimeter area to a wheel, and the county area to the rubber tire. Tryon Street and the Southern Railroad run generally through the county and the city from northeast to southwest. Trade Street runs generally northwest to southeast and crosses Tryon Street at the center of town at Independence Square. Charlotte originally grew along the Southern railroad tracks. Textile mills with mill villages, once almost entirely white, were built. Business and other industry followed the highways and the railroad. The railroad and parallel highways and business and industrial development formed something of a barrier between east and west.
>
> "By the end of World War II many Negro families lived in the center of Charlotte just east of Independence Square in what is known as the First Ward-Second Ward-Cherry-Brooklyn area. However, the bulk of Charlotte's black population lived west of the railroad and Tryon Street, and north of Trade Street, in the northwest part of town. The high priced, almost exclusively

white, country was east of Tryon Street and south of Trade in the Myers Park-Providence-Sharon- East-over areas. Charlotte thus had a very high degree of segregation of housing before the first Brown decision.

"Among the forces which brought about these concentrations should be listed the original location of industry along and to the west of the Southern railroad; the location of Johnson C. Smith University two miles west of Tryon Street; the choice of builders in the early 1900's to go south and east instead of west for high priced dwelling construction; the effect of private action and public law on choice of dwelling sites by black and white purchasers or renters; real estate zoning which began in 1947; and the economics of the situation which are that Negroes have earned less money and have been less able to buy or rent expensive living quarters.

"Local zoning ordinances starting in 1947 generally allow more varied uses in the west than in the east. Few if any areas identified as black have a residential restriction stronger than R-6, which means that a house can be built on a lot as small as 6,000 square feet. Zoning restrictions in other areas go as high as 12,000 and 15,000 square feet per lot. Nearly

all industrial land in the city is in the west. The airport in the southwest with its jet air traffic inhibits residential development. Many black citizens live in areas zoned industrial, which means that the zoning law places no restriction on the use of the land. The zoning laws follow the pattern of low cost housing and industry to the west and high cost housing with some business and office developments to the east.

"City planning has followed the same pattern.

"Tryon Street and the Southern railroad were not built to segregate races. In the last fifteen years grade crossings have been eliminated at great expense at Fourth Street, Trade Street, Twelfth Street and Independence Boulevard; and an elevated half-mile bridge, the Brodie Griffith Skyway, is now being built across the railroad in North Charlotte at a cost of more than three million dollars. The ramparts are being pierced in many spots and inner-city highways now under construction will make communication much simpler.

"However, concentration of Negroes in the northwest continues. Under the urban renewal program thousands of Negroes were moved out of their shotgun houses in the center of town and

have relocated in the low rent areas to the west. This relocation of course involved many ad hoc decisions by individuals and by city, county, state and federal governments. Federal agencies (which hold the strings to large federal purses) reportedly disclaim any responsibility for the direction of the migration; they reportedly say that the selection of urban renewal sites and the relocation of displaced persons are matters of decision ('freedom of choice'?) by local individuals and governments. This may be correct; the clear fact however is that the displacement occurred with heavy federal financing and with active participation by local governments, and it has further concentrated Negroes until 95% or so of the city's Negroes live west of the Tryon-railroad area, or on its immediate eastern fringes.

"Onto this migration the 1965 school zone plan with freedom of transfer was superimposed. The Board accurately predicted that black pupils would be moved out of their midtown shotgun housing and that white residents would continue to move generally south and east. Schools were built to meet both groups. Black or nearly all black schools resulted in the northwest and white or nearly

> all white schools resulted in the east and southeast. Freedom of students of both races to transfer freely to schools of their own choices has resulted in re-segregation of some schools which were temporarily desegregated. The effect of closing the black inner-city schools and allowing free choices has in overall result tended to perpetuate and promote segregation."

300 F. Supp. 1358, 1365-66 (emphasis added).

The April 23, 1969 order directed the School Board to desegregate the schools, partly in the fall of 1969 and the remainder in the fall of 1970.

The April 1969 order was followed by four years of further litigation, appeals, school district and pupil assignment reorganizations and community controversy over the fundamental issues of race and education. Since 1974 long steps have been taken towards putting the race question behind us in the field of

public education. Nevertheless, some of the results and practices of the past remain, and a brief review of that immediate past is highly pertinent to the questions raised by this suit.

The order of April 1969 was not well received.

Second Ward was a black high school on a site adjacent to the School Board offices on McDowell Street, and was ideally located to make desegregation of the county high schools easy. The community had voted bonds to build on the Second Ward site a Metropolitan High School. Shortly after the April 1969 order specifying that the new school would have to be desegregated, the Board closed Second Ward High School and abandoned all plans for Metropolitan High. Thus began a

new cycle of closings of inner-city black schools, which made desegregation of the entire county physically more difficult.

More school closings took place in the summer of 1969; seven all-black schools including Second Ward were closed and the students were reassigned, thereby further complicating desegregation efforts; see 306 F. Supp. 1299, 1302, for the abortive results of that school closing episode.

No plans for complete desegregation of the schools were proposed by the Board, despite several orders of court. Finally, in December 1969, an order was entered (306 F. Supp. 1299, 1313) requiring the Board to cooperate with a consultant to be appointed by the court. A consultant, Dr. Jack Finger, was appointed. The Board remained free to develop plans of

its own, 306 F. Supp. at 1314.

The consultant, after many weeks of study, drafted a pupil assignment plan. That plan, enlarged pursuant to suggestions from as yet unidentified members of the school staff so as to include the whole county, was ordered into effect on February 5, 1970, 311 F. Supp. 265. The order approving the plan contained the requirement:

> "That the defendants maintain a continuing control over the race of children in each school, just as was done for many decades before Brown v. Board of Education, and maintain the racial make-up of each school (including any new and any re-opened schools) to prevent any school from becoming racially identifiable."

That order was stayed by the Fourth Circuit, but was ordered into effect by the Supreme Court and was in effect for the 1969-70

school year. It was eventually affirmed in toto by the Supreme Court. 402 U.S. 1 (1971).

Following the February 5, 1970 order, a working majority of the then School Board did a number of things to make desegregation difficult and resegregation likely. Those matters will be discussed in somewhat more detail later in this order, but they are mentioned now briefly because their effects linger on and the practices then established are still in some substantial particulars being followed. They include:

> (a) Adoption of the "feeder" plan, which divided the single school district into ten separate "feeder areas," thereby making desegregation materially more difficult. It also put more children on busses. In 1969-70 some 23,600 children rode school busses (334 F. Supp. 626-27), and about 5,000 were transported at

reduced rates though apparently at their own expense by contract haulers such as Charlotte City Coach Lines (see Supplementary Findings of Fact, March 21, 1970, paragraphs 11, 14). In 1970 a statewide regulation took effect, providing transportation for the first time for all city children who lived more than 1-1/2 miles from school. The Finger Plan (the only plan ever mandated by the court) also took effect that fall. The Finger Plan, plus the new state regulation, increased the number of students riding school busses or city busses from about 28,600 in 1969-70 to about 39,000 in October 1970. The Board's 1971 "Feeder Plan" then increased the number of students bussed to about 46,667, an additional increase of over 7,500 (334 F. Supp. 626-27).

(b) Insistence upon residence ("neighborhood school theory") as the normal and presumptive basis of pupil assignment, 300 F. Supp. 1358, 1369 (1969).

(c) Closings of "black" schools whose continued use would minimize transportation and desegregation problems, 328 F. Supp. 1346, 1347 (1971).

(d) Use of mobile units to enlarge "white" schools while depopulating centrally located "black" schools,

328 F. Supp. 1346, 1350-51 (1971).

> (e) Refusal to adopt (or at least to admit the adoption of) a system of monitoring transfers among schools so as routinely to promote desegregation and prevent resegregation, all in violation of the order of February 5, 1970 (311 F. Supp. 265, 268).

A full description of those problems as of October 21, 1971, is contained in 334. F. Supp. 623, 626-29, which summarizes the then continuing vitality of segregative actions of the Board and includes the reminder that "racial discrimination through official action has not ended when a School Board knowingly adopts a plan likely to cause a return to segregated schools and then refuses to guard against such resegregation," 334 F. Supp. 629.

The continuation of those problems was again fully noted in a June 19, 1973,

review of the "feeder plan" and signs of continuing discrimination, 362 F. Supp. 1223, 1232-37. By that time the regressive effects of the "feeder plan" had become apparent and the court directed the preparation of a new plan for the fall of 1974, the following year. The Board repeatedly refused to adopt measures to guard against re-segregation of the schools, which was the natural and probable consequence of the "feeder plan" and related assignment policies.

In the fall and winter of 1973-74 one of those happy events occurred which often takes place when people of good will become concerned about public affairs. A Citizens Advisory Group was organized to make recommendations to the School Board. It was composed of some members

selected at large, but about half of its members were persons who were already members of the school "committees" of the various high schools. Its co-chairpersons were two remarkable and public spirited young women, Mrs. Margaret Ray and Mrs. Betsy Bennett. They met and after a considerable amount of work presented some recommendations to the School Board. Their recommendations were not adopted. By April of 1974 time was running out. The court requested the Citizens Advisory Group to draft a new plan for pupil assignment which would meet the essential requirements of fairness and stability contemplated by existing orders of court. The School Board was directed to provide personnel and technical assistance and information as requested by the Citizens

Advisory Group. See Swann order of April 3, 1974, docket entry number 341. Within weeks, the Citizens Advisory Group presented a complete plan which, after long periods of revision and compromise, was adopted by the Board on July 9, 1974. The plan was approved by an order of July 30, 1974, 379 F. Supp. 1102, reading in part as follows:

> "Upon the express assumption and condition that the Board of Education will constructively implement and follow all of its new guidelines and policies (Exhibit A to this order), which were adopted by the Board on July 9, 1974 ... and subject to the further conditions stated below, the court approves those guidelines and policies and the proposals for pupil assignment.
>
> ***
>
> "The future depends upon the implementation of the new guidelines and policies. This approval is expressly contingent upon the implementation and carrying out of all the stated policies and guide-

> lines. Here is the heart of the matter. Only if they are thus implemented is it likely that a fair and stable school operation will occur, and that the court can close the case.
>
> ***
>
> "Because of the obvious change in Board attitude, it will be assumed that the new Board has taken charge of desegregation in the schools and that they will read and follow and implement their own 'book' -- the guidelines and adopted policy recommendations. It will be assumed that the sizeable continuing problems yet remaining will be resolved by spontaneous action by staff or board, with input as needed from the Citizens Advisory Group and other community 'ombudsmen.' "

379 F. Supp. 1102, 1103, 1105 (emphasis added).

The "CAG plan" brought about substantial peace among the warring factions, and pupil assignments have been made pursuant to it since 1974. The three-year re-evaluation which the plan promised for 1977 had to be made a year late because of a turnover in the office of superintendent,

but it was finally made; and a series of re-assignments of pupils and other modifications were adopted by the Board in the spring of 1978 to comply with existing court orders, and to carry out the Board's own resolution, to keep the schools desegregated.

It is those 1978 modifications which plaintiffs challenge.

***

The original Swann parties have not revived those old questions; they are in fact intelligently coping with the residue of our centuries of segregation; and in this suit they have joined together in asking the court to let the situation alone -- as the court has been happy to do since 1974. The analysis of the present state of affairs which follows is there-

fore made with considerable reluctance, even though it is made necessary by the realities of the suit. The legacy of the past is still with us; pressures toward resegregation are constant, heavy and insistent, and school boards in this community may have to cope with segregation problems for some time to come.

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IV.
HISTORY OF CHARLOTTE-MECKLENBURG SCHOOLS (CONTINUED); MORE DETAIL ON THE FOUR ASPECTS OF PUPIL ASSIGNMENT WHICH ARE PRINCIPALLY IN QUESTION HERE.

Plaintiffs say that segregation is over in the Charlotte-Mecklenburg schools and that under Bakke and Pasadena race may no longer be considered in pupil assignment.

Defendant School Board says that though the 1978 plan may be required by

orders of court, it is separately justified by the Board's independent commitment to maintain desegregated schools, regardless of court orders.

Intervening ("Swann") defendants say that segregation still persists; that the badges of discrimination described in previous court orders are still obvious; and that what the Board did in 1978 is not only justified but required by the law. The contentions and evidence of intervening defendants relate primarily to four aspects of pupil assignment that were subject to remedial orders in the Swann case. Those four aspects are:

(a) Construction, location and closing of school facilities, including mobile units.

(b) Placement of elementary and kindergarten grades in the schools.

(c) Pupil assignment and transfer

policy.

(d) The unequal burdens on black children compared to the burdens on white children.

These four elements will be discussed separately. Some repetition of the above history may take place; that repetition is to insure that the essential history of each of these aspects of school operation can be fully considered.

A. CONSTRUCTION, LOCATION AND CLOSING OF SCHOOL BUILDINGS CONTINUE TO PROMOTE SEGREGATION.

On April 23, 1969, it was found as a fact that the schools were still largely segregated, 300 F. Supp. 1358, 1367. Most children attended all-white or all-black schools. Second Ward was the only black high school in the center of the urban area. A bond issue had been passed and

the School Board had money and plans to replace Second Ward with a Metropolitan High School, a specialty "magnet" school. Second Ward had a good central location, easily accessible to both blacks and whites, and an ideal spot for a high school to make desegregation of high schools easy. Shortly after desegregation was ordered on April 23, 1969, the School Board cancelled its plans for Metropolitan High School, 300 F. Supp. 1381, 1383. It was never built. This action has complicated and tremendously increased the cost and inconvenience of all subsequent activity to desegregate high schools.

In the summer of 1969 a school-closing desegregation plan was proposed by the Board. Its principal feature was the

closing of seven all-black inner-city schools and the reassignment of the children to white schools. This plan was approved reluctantly, despite its excessive burdens on black children, because it appeared to promise better education for 4,245 black children, 306 F. Supp. 1291. It largely failed to accomplish this purpose. The sad results of that maneuver are described in 306 F. Supp. 1299, 1302; it transferred to "white" schools only 1,315 instead of the promised 4,245 black pupils.

The court also ordered a report on all proposed school construction projects and directed the Board to retain all land it owned in the mid-city area.

On December 1, 1969, the court disapproved the Board's report on construction

projects and disapproved generally the desegregation plan then proposed. One of the grounds was that the Board intended to continue to keep 100% black all of the seven all-black elementary schools then remaining in the system, 306 F. Supp. 1299, 1307.

After the Supreme Court had ordered into effect the court's desegregation plan of February 5, 1970, the School Board proposed a "feeder" plan which, among other things, called for the elimination of two black inner-city schools (Double Oaks Elementary and Northwest Junior High), and the reduction of West Charlotte High, the only remaining formerly black high school, to about 60% of capacity. On June 22, 1971, the court found the plan to be characterized by the "abandon[ment

of] property in ... wholesale fashion to preserve discrimination." 328 F. Supp. 1346, 1352. The plan was disapproved as "regressive and unstable in nature and results," 328 F. Supp. 1346, 1350.

A week later, on June 29, 1971, the court reviewed a further proposed revision for the 1971-72 school year, which largely restored West Charlotte High School and Northwest Junior High, but again proposed the closing of (formerly black) Double Oaks Elementary, on the alleged ground that the school was inaccessible because of its location in a cul-de-sac. The court, however, found that in fact the Board owned a right of way, at the time passable, which with a small amount of improvement would solve the access problems, 328 F. Supp. 1346, 1348. It appeared that an

underlying concern of the Board was that "white flight" would prevent desegregation of this inner-city school, a rationale which the Supreme Court in Monroe v. Commissioners, 391 U.S. 450, 459 (1968), had held to be inadequate to overcome constitutional obligation, 328 F. Supp. at 1352.

On October 21, 1971, the court reviewed the School Board's recent actions and noted that decisions about facilities were having an adverse impact on compliance with the Board's constitutional obligations in the pupil assignment area:

> "In addition, several highly specific official actions of the school board itself since the April, 1971 decision of the Supreme Court have added new official pressures which tend to restore segregation in certain schools. These are the construction program (use and location of mobile units); the under-population and proposed

> closing of formerly black schools; and several recent decisions about pupil assignments and transfers. The current plan contemplates use of 232 mobile units. These units, in the main, are located or scheduled for location at suburban schools remote from the black community. Simultaneously, the formerly black schools, with few exceptions, are being operated at considerably less than capacity."

334 F. Supp. at 623, 628.

In June 1973, the question of the location and use of school facilities was raised again, this time in the context of proposed plans for the 1973-74 school year. The court approved in large measure the Board's proposal, which, for the first time, substantially breached the insularity of southeast Mecklenburg from the burdens accompanying desegregation. However, it pointed out several "signs of continuing discrimination." One of those signs was

the apparent continuation of the attack on the vitality of West Charlotte High School, a modern but formerly all-black school. The proposed plan called for a dramatic increase in facilities at the outlying white schools through the increased use of mobile classrooms, while again reducing the assignments of pupils to West Charlotte and other inner-city and northwest schools. The court found the continuing effort to keep West Charlotte under capacity resulted from its identity as a "black" school and from pressure to close the school as soon as the court would permit. No substantial educational or administrative reason was advanced to support the Board's position. 362 F. Supp. 1232-33. The court summed up "the 'leapfrog' problem" which resulted

from a combination of facility location and attendance line-drawing called the "feeder plan":

> "... The pupil assignment plan has a fundamental, built-in impediment, which makes all desegregation efforts more difficult and inconvenient than need be. This is the creation, as the first step in desegregation, mostly within the near reaches of the south and east part of the district, of walk-in schools, before dealing with problems of desegregating outlying schools. These walk-in schools tend to absorb the black students who live in the central and south parts of the city. Desegregation of east and southeast white schools and northwest black schools can then be accomplished only by a 'leap-frog' operation, transporting children long distances across the center of the city, instead of shorter distances along radii into and out of the center of the city."

362 F. Supp. at 1236 (emphasis in original).

The 1974 joint proposal of the School Board and the Citizens Advisory Group (CAG) was dated July 9, 1974, filed for approval July 10, 1974, and approved by the court

July 30, 1974. It contains the following "Basic Guideline" to govern future decision making on school facilities:

> "XI. Future Site Selection: School planning is not to be predicted on population growth trends alone; consideration is to be given to the influence new building can be toward simplification of an integrated pupil assignment plan. Buildings are to be built where they can readily serve both races.
>
> "When consideration is being given to the closing of any school, or its conversion to another program, the impact of such action on an integrated school system should be taken into account. The closing or conversion should not jeopardize the integrated status of the system."

School Board Exhibit 3, Par. 11 at 4 (emphasis added).

On July 11, 1975, the court removed Swann from the active docket, while retaining jurisdiction, and noted: "Though continuing problems remain, as hangovers from previous active discrimination,

defendants are actively and intelligently addressing these problems without court intervention." 67 F.R.D. 648, 649.

Since 1974, five major changes in facilities have occurred in the public school system. The School Board opened Piney Grove Elementary School and J. H. Gunn Elementary School, moved the Sharon Elementary School facility, opened Northeast Junior High School, and under the 1978-79 plan, closed Wilmore Elementary School. Transcript at 105-110, 167.

Piney Grove Elementary School. -- Piney Grove, opening two years ago and housing grades K (kindergarten) through 3, is located in the southeast quadrant of the county, approximately three miles south of Idlewild Elementary School. It is

situated in a predominantly white residential community. Transcript at 106-108, 148 (Testimony of Dr. Wayne Church, Manager of Research for the School Board); School Board Exhibit 20. The base attendance area for Piney Grove is on the boundary line of the Idlewild school attendance area, within a few miles of Piney Grove. The black elementary school students who attend Piney Grove live in Lincoln Heights, a predominantly black area in the northwest quadrant of the city, between eight and ten miles from the school and on the opposite side of the industralized mid-city area. Transcript at 107-08; School Board Exhibit 20. At the time the School Board approved the location of Piney Grove, it was aware that the school was to be placed in a predominantly white residen-

tial area and that black students would have to be brought eight to ten miles to the school from the inner city. Transcript at 242 (Testimony of Phillip O. Berry, Chairman of the School Board).

J. H. Gunn Elementary School. -- The J. H. Gunn school operates on the campus formerly housing the Northeast Junior High School, in the far eastern portion of the county. It serves grades K through 6. Transcript at 108-09 (Testimony of Dr. Wayne Church); School Board Exhibit 20. The school is located in the immediate area of the J. H. Gunn community, in which approximately 75 black, school age children reside. Transcript at 159-60 (Testimony of Dr. Wayne Church); School Board Exhibit 20. At its inception, the School Board was aware of the necessity

of transporting black elementary school children many miles from the inner city to the J. H. Gunn school. Transcript at 243-44 (Testimony of Phillip O. Berry).

Sharon Elementary School. -- The new Sharon Road facility was situated in southeast Charlotte, in the predominantly white, Foxcroft residential area, just northwest of its former site. Transcript at 106 (Testimony of Dr. Wayne Church). The Sharon school serves grades K through 6. School Board Exhibit 6. The new facility incorporated the entire attendance area of the old elementary school facility plus a few additional blocks to the north to put the new building within its own attendance area. The local attendance area around the school is composed of an almost all white residential

community. Transcript at 232 (Testimony of Dr. J. M. Robinson, Superintendent of the school system); see School Board Exhibit 20 (attendance lines). The black elementary school students assigned to Sharon come from the Boulevard Homes off of West Boulevard, a predominantly black community west of mid-city, approximately six or seven miles from the Sharon school. Transcript at 108 (Testimony of Dr. Wayne Church); School Board Exhibit 20. At the time the School Board decided to locate the Sharon school in Foxcroft, it knew that inner city blacks would have to be transported to the school. Transcript at 243 (Testimony of Phillip O. Berry).

Northeast Junior High School. -- The Northeast Junior High School was moved about one and one-half miles south to its

present site about three years ago. It is located on the same tract as Independence High School, in the extreme eastern portion of the county. Transcript at 109; School Board Exhibit 20. Although the record is not clear, it appears that Northeast receives its students, black and white, from the eastern part of the county. See transcript at 110 (Testimony of Dr. Wayne Church); 153-54 (Testimony of Patricia M. Lowe, School Board member); School Board Exhibit 3, at 19.

Wilmore Elementary School. -- The formerly white Wilmore Elementary School is located in a now predominantly black community in the inner city. Its physical plant is relatively new. Wilmore has not been paired with any other school since 1974, and over the past three or four

years has become predominantly black. The 1978 plan called for the closing of Wilmore School. Transcript at 167-68 (Testimony of Dr. Wayne Church). Wilmore has had an unstable attendance pattern since 1974. See School Board Exhibit 11, at 8; Transcript at 167, 169 (Testimony of Dr. Wayne Church), 203 (Testimony of Dr. J. M. Robinson). Despite the fact that Wilmore is located equidistant from both black and white population centers, the integration of the school was always problematical under the 1974 "feeder plan." Transcript at 203-04 (Testimony of Dr. J. M. Robinson). Although the Board considered pairing Wilmore with the new Sharon School, it never did so. Id.

The Board is currently considering its future need for new school buildings. At

the time of the hearing the Board had not instructed its staff to try and find school locations "that would enable it to more easily desegregate those schools." Transcript at 138 (Testimony of Patricia M. Lowe). Superintendent J. M. Robinson testified that he had recommended that the staff consider placing new elementary schools along Highway 51, which runs through the predominantly white, far southeast portion of the county, far from most black homes. See Transcript at 206, 207; School Board Exhibit 20. He also expressed the opinion that the staff survey will show a need for future elementary school sites running from Derita (north and slightly east of the inner city) along a line southeast to Hickory Grove (east of the inner city). These schools, <u>if in</u>

fact built, would be located nearer to the county's northern centers of black, school age population. There is no indication of record that re-opening or building of elementary schools (or any other schools) is being planned for the inner city, or for the western or northwestern portions of the district. See Transcript at 206; School Board Exhibit 20.

The portion of the 1974 desegregation plan (together with earlier, applicable orders) relating to the placement of public school facilities has not been fully implemented. Plaintiffs have not shown any probability of demonstrating implementation after further proceedings. That portion of the plan, together with the court's applicable orders, is interrelated with and is not separable from other major components

of the pupil assignment features of the desegregation efforts of the court, the School Board, and the citzens of Mecklenburg County. The location of schools plays a large if not determinative role in (1) assigning the burden of attending non-neighborhood schools to various segments of the community, (2) making various grades available in various areas of the community, and (3) insuring that any given assignment and feeder plan will provide meaningful desegregation, rather just the predictably short lived <u>appearance</u> of desegregation.

In short, the construction, location and closing of schools have continued to make desegregation more difficult.

B. PLACEMENT OF KINDERGARTEN AND ELEMENTARY SCHOOL GRADES REMAINS DISCRIMI-

NATORY AND UNFAIR TO THE SMALLEST BLACK CHILDREN.

The School Board's limited plan for 1969-70 included the closing of seven predominantly black, inner-city schools, including five elementary schools. The reassignment of elementary school pupils under the 1970 plan required "transporting black students from grades one through four to the outlying white schools; and ... transporting white students from the fifth and sixth grades from the outlying white schools to the inner-city black schools." Swann order of March 21, 1970 (Supplemental Findings of Fact), at Pars. 32, 33.

The earliest remedial plans, therefore, had the effect of decreasing the elementary school classroom space in the inner city and putting the burden of

desegregating the grades serving the youngest students almost entirely on the black children.

On August 3, 1970, the court, finding that not all reasonable efforts to achieve desegregation had been utilized, again suggested "restructuring" grade distribution among the schools as an available method. 318 F. Supp. 786, 799.

The mid-1971 proposal submitted by the School Board, which included the closing of Northwest Junior High and Double Oaks Elementary, also proposed the abandonment of predominantly black elementary school facilities. The enrollment at 15 elementary schools was to be cut roughly in half; nine of those schools were to lose their fifth grades and continue to serve only grade six. Younger students

at these predominantly black schools would be reassigned and transported to outlying, predominantly white elementary schools. The plan, which was withdrawn by the Board during the hearing on its merits, was "discriminatory in detail and in overall result; [it] placed increased burdens upon black patrons while partially relieving white patrons of similar burdens; and [it was] reasonably susceptible of the interpretation that [it was] the first long step in the liquidation of the inner-city 'black' schools." Swann order of June 29, 1971; 328 F. Supp. 1346-1347.

Two years later, on June 19, 1973, those failings of the early plans which resulted in the elimination of neighborhood classroom facilities for the youngest black students in the system had not

abated. The black elementary school children in grades kingergarten through four were still getting "the most and the longest bus rides in the county," and virtually all the youngest black students in the system were being transported to distant schools. 362 F. Supp. 1223, 1230, 1232.

The joint proposal submitted by the School Board and CAG in July 1974 recognized the skewed distribution of grades throughout the elementary schools, and the need for improvement.

> "... There has been an effort toward selection of specific major deviations from the feeder-school concept, where such would aid in providing equalization of transportation burden, and toward the allocation of grades to schools on a basis that would give schools of each grade-level organization to all areas of the city and county."

School Board Exhibit 3, Introduction (emphasis added). The proposal, approved by the court, established the "basic guideline" that

> "... schools serving primary grades (including the voluntary-attendance kindergartens) are to be located in every section of the system. ... In the future, the creation of any school serving fifth and sixth grades only is to be avoided; in the next new pairings, the primary grades are to be located in a black residential area."

Id., Basic Guidelines for this Proposal, at 3 (emphasis added).

Not only the court but also those involved in the formulation of the 1974 joint proposal (including School Board members), those responsible for administering the pupil assignment plan between 1975 and 1978, and those responsible for formulating the 1978 pupil assignment plan now challenged, all understood that the 1974

plan contemplated the use of formerly black and inner-city school facilities to house grades K through 3. See, e.g. Affidavit of Margaret Ray (Former Chairman of CAG) (1974 proposal called for reassignment, where feasible, of grades 1 through 3 to formerly black schools); Transcript at 237-40 (Testimony of Phillip O. Berry, member of School Board since 1972) (Absence of any lower elementary school grades in the inner city was seen by the Board as an inequity in the 1974 plan, contributing to its instability and requiring remedial action on review). The 1974 plan itself called for the use of the Lakeview and Villa Heights Elementary School facilities for grades K through 2. Transcript at 144-45 (Testimony of Dr. Wayne Church); School

Board Exhibit 3, at 16, 18. Lakeview and Villa Heights had been white elementary schools until 1970 or 1971; they had become predominanly black elementary schools by the time the 1974 plan was composed and implemented. Transcript at 114-16 (Testimony of Dr. Wayne Church); Transcript at 184-85 (Testimony of Elizabeth Randolph, Associate Superintendent of Schools). Billingsville, historically a predominantly black K through 6 elementary school, a black island in a white community, continued to house grades K through 6 under the plan. Id.

After 1974, the School Board made two major changes in the location of elementary school grades. First, several fourth grades from outlying elementary schools were moved to elementary schools in the

inner city which housed grades 5 and 6. Transcript at 146-47 (Testimony of Dr. Wayne Church); see School Board Exhibit 6. Second, the Board completed to its satisfaction the introduction of kindergarten grades into school facilities housing primary grades (grades 1 through 3). Transcript at 147-148 (Testimony of Dr. Wayne Church), 177-78 (Testimony of Elizabeth Randolph).

Since the 1974 decision to maintain Billingsville as a K through 6 school and to house grades K through 2 at Lakeview and Villa Heights, only one minor change has been made to increase the use of inner-city schools for the lower elementary school grades. In the 1978 plan, Lakeview was made K through 3 instead of K through 2. School Board Exhibit 13, at

"Proposed Change V." The School Board has taken no action since 1974, save for the change at Lakeview, to provide increased primary grade service to the black community. See, e.g. Transcript at 115 (Testimony of Dr. Wayne Church) (Since 1974 the School Board has not rearranged the grade structure in any formerly black school to serve grades K through 4) 177-78 (Testimony of Elizabeth Randolph) (School Board never instructed staff to design a primary grade program for a formerly black school); 200-02 (Testimony of Dr. J. M. Robinson) (Reversing grades in the inner-city schools was discussed as a possibility in drawing the 1978 plan, but rejected in favor of reassigning fewer students).

One member of the School Board testified that, in her opinion, the reason

lower elementary school grades were not reallocated to the inner-city schools was that if such a change were made "the whites would have not attended, let their children attend." Transcript at 137 (Testimony of Patricia M. Lowe).

The promise of the 1974 plan to bring the lower grades into formerly black schools has not been fulfilled. The School Board has decided that kindergarten classes should be placed in an elementary school if and only if the facility also houses the lower elementary school grades. Transcript at 177-78 (Testimony of Elizabeth Randolph). As noted earlier, however, with few exceptions, the formerly black elementary schools continue to house only the upper elementary school grades.

The portion of the 1974 desegregation

plan (together with earlier, applicable orders) relating to the placement of kindergarten and elementary school grades throughout the Charlotte-Mecklenburg school system has not been fully implemented. Plaintiffs have not shown any probability of demonstrating implementation after further proceedings. That portion of the plan is interrelated with and not separable from other major components of the desegregation effort. The location of elementary and kindergarten classes throughout the system ultimately depends on the availability of physical facilities at any actual or proposed site. Furthermore, site selection for classes determines who is to bear the burden of leaving the neighborhood and how much of a burden that is to be upon any given individual

or identifiable group of individuals.

In short, placement of elementary school grades and kindergartens remains grossly unfair to the smallest black children.

C. FAILURE TO MONITOR THE THOUSANDS OF PUPIL TRANSFERS THAT TAKE PLACE EACH YEAR, IN THE CONTEXT OF THE "FEEDER" PLAN AND IN A COMMUNITY OF LONG STANDING HOUSING SEGREGATION, TENDS TO PROMOTE SEGREGATION IN THE SCHOOLS.

This court's first substantive order in Swann, April 23, 1969, found as fact that:

> "The system of assigning pupils by neighborhoods, with freedom of choice for both pupils and faculty, superimposed on an urban population pattern where Negro residents have become concentrated almost entirely in one quadrant of a city of 270,000, is racially discriminatory."

300 F. Supp. 1358, 1360.

On June 21, 1969, the court ruled that though "freedom of choice" transfers

were not per se unconstitutional, they were subordinate to the constitutional mandate to desegregate. 300 F. Supp. 1381, 1384. In November of that year the court instructed the Board that, based on the past operation of the transfer plan in this school system (no white student ever having elected to attend a predominantly black school), unregulated transfers were not likely to be consistent with constitutional requirements. 306 F. Supp. 1299, 1304.

In February 1970 the court noted the failure by that time of school officials and outside consultants to reach an adequate solution, and called for several specific steps to be taken immediately. Among them (as modified by a later order) was a requirement that the Board adopt an

active rather than continue a passive attitude toward transfer:

> "That the defendants maintain a continuing control over the race of children in each school, just as was done for many decades before Brown v. Board of Education, and maintain the racial make-up of each school (including any new and any re-opened schools) to prevent any school from becoming racially identifiable.
>
> "That 'freedom of choice' or 'freedom of transfer' may not be allowed by the Board if the cumulative effect of any given transfer or group of transfers is to increase substantially the degree of segregation in the school from which the transfer is requested or in the school to which the transfer is desired.
>
> "That the Board retain its statutory power and duty to make assignments of pupils for administrative reasons, with or without requests from parents. Administrative transfers shall not be made if the cumulative result of such transfers is to restore or substantially increase the degree of segregation in either the transferor or the transferee school."

311 F. Supp. 265, 268-69, modifed in part by 318 F. Supp. 786, 801.

A modified "feeder" plan was adopted in 1970, with the court's reluctant approval, in substitution for the "Finger" plan earlier approved by this court and the United States Supreme Court. Over a year later, on October 21, 1971, the court found as fact that, in stark noncompliance with the court's earlier orders, virtually no safeguards had been established to monitor or control the resegregative effect of unlimited student transfers:

> "... There is, according to the evidence, no board policy even to consider race in pupil transfers unless a particular transfer or enrollment will result in making a school more than 50% black. (What they would do even in that event is not clear.) There is no policy to restrict transfers which have the cumulative effect of substantially increasing segregation; no policy to learn what children move from one attendance zone to another during the summer, and to take these inevitable changes of residence into

account in planning fall pupil assignments; no central method of keeping track of changes of residence during the school year; and no policy to check on 'changes of residence' to determine whether such changes are bona fide or not. There is also no admitted practice of doing any of these things to comply with the orders of the court (although it might be inferred from the current statistics that, without admitting to a policy, the staff are being allowed or expected in fact to keep all schools less than 50% black).

***

"The word 'substantially' was put into the order to allow the Board leeway for use of discretion and common sense, but not to authorize abandonment of control until a school has already become predominantly black.

"Racial discrimination through official action has not ended in this school system.

"Racial discrimination through official action has not ended when a school board knowingly adopts a plan likely to cause a return to segregated schools and then refuses to guard against such re-segregation."

334 F. Supp. at 629 (emphasis added).

On June 19, 1973, the court found that unrestricted transfers continued to plague desegregation efforts, particularly at schools such as West Charlotte High School where the black student population was maintained at just below 50% of the "projected" student body; such "projections" were chronically inaccurate for their failure, in part, to anticipate the effect of a lax transfer policy. 362 F. Supp. 1223, 1233-34.

The Joint Citizens Advisory Group - Board proposal approved in 1974 implicitly recognized the fact that the Charlotte-Mecklenburg school system could not be desegregated in the absence of a coherent transfer policy; its first "Basic Guideline" was:

I. Transfer policy and procedure.

> Explicit policies and procedures for the management of future reassignments of pupils, either in the interest of the school system or on request of pupils, need formulation and adoption. Such policies are to fulfill the purpose of maintaining an integrated school system with a stabilized assignment program.

School Board Exhibit 3, at 2.

Pending further implementation of the guideline, the proposal established interim safeguards providing, inter alia, that each individual transfer request was to be evaluated by the Board in light of its effect on the racial composition at both the sending and the receiving school, and was to be justified by a change in residence or other bona fide reason for transfer. The assignment pattern resulting from the implementation of these guidelines, was, under the terms of the 1974 plan, to be reviewed in three years. See

id. at 5-6.

In March 1975 the School Board submitted a report on compliance. That report contained a proposal to define further the control over inter-school transfers to be exercised by the Board and administrative staff for the purpose of preventing those transfers from interfering with the fairness, stability, and general success of the desegregation effort. The plan set numerical benchmarks against which to measure the effect of any proposed, individual transfer. See School Board Exhibit 5, at II-6 to II-7.

Students frequently change schools. For example, during school year 1975-76, the Board processed transfer requests equaling 25.8% of the elementary students, 20.7% of the junior high students, and

20.2% of the senior high students. Transcript at 84 (Testimony of Dr. Wayne Church) School Board Exhibit 11. During 1977-78, for elementary schools alone, admissions and withdrawals totaled over 10,600! Board Exhibit 17. Nationwide, census figures show one-fifth or more of the families move every year. 334 F. Supp. 626.

Despite the continuing and substantial number of transfer requests, the record shows an absence of any coherent, sustained effort (a) to monitor student flow resulting from pupil reassignment, (b) to evaluate the impact of reassignment on desegregation efforts and (c) to provide such information to the School Board at a meaningful time -- that is, before the Board's decision is made on individual reassignment requests. When a

transfer request is made, the administrative staff investigates the request and makes a recommendation. The staff does not take principally into consideration the impact of the requested transfer on segregation. The staff may be aware of such impact, "but the intensity of the request determines action toward it." Transcript at 155-56 (Testimony of Dr. Wayne Church) (emphasis added). If the staff recommends a transfer, that recommendation is sent on to the School Board for its approval. The form on which that recommendation is sent does not have a blank calling for any indication of the impact of the transfer on the racial composition of the sending or receiving school; no formal recommendation is made by the staff regarding any particular,

proposed transfer's impact on racial composition. Transcript at 164-66 (Testimony of Dr. Wayne Church). Informal recommendations are made from time to time on individual applications for transfer, but only, apparently, when both the staff and School Board have denied the request, the student has appealed, and the matter has come on for hearing before the Board. Transcript at 156-57 (Testimony of Dr. Wayne Church).

The only data on racial composition compiled at regular intervals and presented to the Board are the monthly reports on attendance and racial composition at the various schools in the system (School Board Exhibit 6). Those compilations would be useful to Board members who happened to have before them, at a meaningful time,

enough of the past monthly reports to determine whether there was any observable trend at the relevant schools. The reports, however, just show the gross changes in school population, changes which result from several factors in addition to School Board reassignment policies and practices.

A study was submitted by the staff to the School Board in May 1977. See School Board Exhibit 11. That study sets out, for the first time, the changes in the racial compositions of the system's schools -- in this case for the four years preceding the 1977-78 school year. Like the monthly reports, it did not isolate any data, or include any analysis, relating exclusively to the impact of intra-system transfer policies on racial composition. At best, that study would appear to be

designed to assist the Board in meeting its commitment to review the impact of transfer practices three years after the 1974 implementation. It could not have been part of the required, continuous monitoring of the impact of intra-system transfers.

At the time of the hearing, the staff was in the process of conducting a study on the impact of reassignment practices on racial composition. Transcript at 231 (Testimony of Dr. Wayne Church). The only written evidence supplied by the Board which does provide apparently self-explanatory though isolated data on the impact of reassignment practices is Exhibit 18, prepared the day before the hearing. Transcript at 120 (Testimony of Dr. Wayne Church).

Phillip O. Berry testified that the Board was always "very aware" of the impact of reassignments on racial composition in the schools, explaining:

> "We had policies which involved requests, minority to majority transfers and other things, and the staff made us aware that they were operating on guidelines as well as residential transfers. The majority of transfer requests which were granted was based upon residential patterns ... ."

Transcript at 244-45 (emphasis added). As noted earlier, the transfer policies as approved by the court in 1974 and as amended in 1975 specifically require that even transfer requests resulting from claimed residence changes be considered prior to approval in light of their impact on racial composition.

That portion of the 1974 desegregation plan (together with earlier, applicable

orders) relating to the monitoring and control of pupil transfers has not been fully implemented. Plaintiffs have not shown any probability of demonstrating otherwise in further proceedings. This portion of the plan is interrelated with all other identified components of the pupil assignment features of the desegregation plan because, simply put, the resegregative tendency of an unrestricted or unmonitored transfer policy or practice can, history teaches, undo much of what the community has struggled to accomplish. The location of buildings and the placement of classes within those buildings can have little positive, lasting impact, unless the flow of students among various facilities is controlled.

In short, in this essentially segre-

gated community, and under the "feeder" plan, the Board's continued failure to monitor and control the many thousands of yearly pupil transfers tends to promote and permit re-segregation. In default of such continuing controls, periodic large scale reassignments like those made in 1978 will continue to be necessary.

D. DISCRIMINATION BURDENS OF DESEGREGATION REMAIN UPON THE BLACK CHILDREN.

The partial desegregation plan, submitted in amended form by the School Board in July 1969 for the 1969-70 school year, contained, for the first time, a formal acknowledgement of the Board's affirmative duty to desegregate the school system. However, that plan put almost the entire burden of desegregation on the black community.

> "... The Board plan proposes to close Second Ward High School, Irwin Avenue Junior High School and five inner-city elementaty schools (five of which were already marked for abandonment) and to reassign their 3,000 students to outlying white schools. This part of the plan has struck fire from black community leaders and some other critics. Counsel for the plaintiffs contend that it puts an unconstitutional and discriminatory burden upon the black community with no corresponding discomfort to whites. One spokesman for a large group of dissenting and demonstrating black citizens was allowed to express his views at the August 5, 1969 hearing. Threats of boycotts and strikes have been publicized.
>
> "This part of the plan is distasteful, because all but 200 of the students being reassigned en masse are black. It can legitimately be said and has been eloquently said that this plan is an affront to the dignity and pride of the black citizens. Pride and dignity are important. If pride and dignity were all that are involved, this part of the plan ought to be disapproved."

306 F. Supp. 1291, 1296 (August 15, 1969).

The court approved the plan on an interim basis because, ostensibly, it offered a

desegregated school year to some 4,200 black students, but stated that "It is not the intention of this court to endorse or approve any future plan which puts the burden of desegregation primarily upon one race." 306 F. Supp. at 1298.

On November 7, 1969, the court found that the School Board had failed to implement the plan as approved in August; that they had allowed black students who were to be transferred to white schools to attend black schools closer to home; that the results were meager in terms of actual desegregation; and that at the most, not over 1,315 of the 4,245 promised transferees had ended up in white schools. 306 F. Supp. at 1302.

More such official discrimination surfaced in 1971 in the plan proposed by

the School Board in substitution for the Finger plan earlier adopted by the court. That plan, explained in some detail earlier, was disapproved on June 22, 1971, in part because it sought to abandon the inner-city "black" schools. The plan was found to be regressive and unstable, and to put the burden of desegregation on the black community, requiring some of the youngest black elementary school children to travel over twelve miles while no corresponding duty was placed on white students. School officials were reminded that a desegregation plan placing substantially unequal burdens on different races in the community was just as much official action unlawful under the Constitution as had been the earlier, official acts of discrimination which necessitated the

desegregation plan in the first instance. See Swann order of June 22, 1971, at 1-6. See also 328 F. Supp. 1346 (June 29, 1971).

Two years later, on June 19, 1973, after allowing the School Board opportunity during the 1971-72 and 1972-73 school years to make appropriate adjustments in prior plans, the court reviewed the proposals for the 1973-74 school year and found many of the same problems addressed by the court four years earlier. Principal among them was the continuing placement of the heaviest burden of desegregation on black students in terms of (1) the number and percentage of black students sent to outlying areas compared with the number and percentage of white students sent to the inner-city and near northwest area; (2) the imposition of the greatest burden

on the youngest black students in the system; and (3) the number of years black students would be required under the plan to travel to non-neighborhood schools in comparison with their white counterparts. The court found these effects to be "signs of continuing discrimination" and required, as an interim remedy, that the School Board repopulate some of the under-capacity, inner city schools with students from outlying schools having the lowest proportion of black students. 362 F. Supp. 1223, 1232-38.

The joint CAG-Board proposal approved by the court in 1974 recognized that equalization of the burdens of desegregation was instrumental to any realistic plan: "In arriving at the present proposal, mutual efforts have been made to establish

fairness in the county-wide distribution of the burdens of long or long-term transportation to and from distant schools. There has been an effort toward selection of specific major deviations from the feeder-school concept, where such would aid in providing equalization of transportation burden ... ." School Board Exhibit 3, Introduction. In line with this guiding principle, the plan called for several specific changes:

> "The elementary school areas assigned to West Charlotte in both the Board and CAG plans are to form the base assignment area for that school. Other areas assigned to West Charlotte are to be selected so as to equalize the out-busing burden and provide a stability-capable enrollment for that school.
>
> ***
>
> "As many long-distance satellite arrangements as possible are to be eliminated. When necessary, a deviation from the feeder arrangement is to be made by assigning a satellite to a closer school for at least one

school level of grades.

***

"No children in a satellite or in any other area close to a school are to be so assigned that they are transported away from their home area for the full 12 years of school. Out-bussing assignments are to be distributed as equally as is possible and practical.

***

"Where practical immediately, and where not, in the near future, schools serving primary grades (including the voluntary-attendance kindergartens) are to be located in every section of the system. In schools now paired, when possible the fourth grade is to be moved from the primary school to the fifth and sixth grades school. In the future, the creation of any school serving fifth and sixth grades only is to be avoided; in the next new pairings, the primary grades are to be located in a black residential area. As kindergartens are phased in, priority is to be given, within the restraints of regulations, to the placing of kindergartens in the schools on the west side of the county."

See id. at 2, 3 (emphasis added).

Except for black children living near and attending Lakeview (formerly white), Villa Heights (formerly white), and

Billingsville (a formerly black school surrounded by a white community), black elementary children bear the major burden of travel to outlying schools in predominantly white neighborhoods. The inner city elementary schools continue to house primarily the upper elementary school grades. Wilmore Elementary School, in the inner city, has been closed under the 1978-79 assignment plan. No new elementary school facilities appear to be planned for the center city; rather, the record suggests that facilities are generally to follow the outward migration of new housing, away from the center city.

Discriminatory burdens cannot be reduced if school facilities and classes continue to be located at sites which by their very location make such reduction

impossible.

That portion of the 1974 desegregation plan, together with earlier, applicable orders, relating to equalizing the burdens of desegregation among races has not been fully implemented. Plaintiffs have not shown any probability of demonstrating such implementation after further proceedings. Establishment of a fair plan is interrelated with and not separable from other features of the pupil assignment portion of the desegregation effort.

Neither is it separable from the constitutional mandate to desegregate the schools. See, e.g., Keyes v. School District No. 1, Denver Colorado, 413 U.S. 189, 241 (Powell, J., concurring in part and dissenting in part); NAACP v. Lansing Bd. of Education, 559 F. 2d 1042 (6th Cir.),

cert. denied, 434 U.S. 997 (1977).

In short, black children and their families continue to bear discriminatory burdens of desegregation.

V.
THE 1978 PUPIL ASSIGNMENT PLAN IS A VALID EXERCISE OF THE SCHOOL BOARD'S AUTHORITY.

A. THERE HAS BEEN NO PRIOR COMPLETE IMPLEMENTATION OF A JUDICIAL REMEDY RELATING TO PUPIL ASSIGNMENT.

The record, summarized in this order, wholly fails to support a finding, or the promise of one, on the first essential element of a claim under the Pasadena decision -- prior, complete implementation of a judicial remedy relating to a separable component of school administration -- here, pupil assignment. The facts are to the contrary. "Racially neutral attendance patterns" have never been achieved.

B. THE CONTINUING PROBLEMS DEALT WITH BY THE 1978 PLAN ARE WITHIN THE SUBSTANTIAL, IF NOT THE EXCLUSIVE, CONTROL OF THE SCHOOL BOARD.

The record does not support an interim finding, or the reasonable promise of a final finding, that the continuing problems regarding the location of facilities, the placement of elementary school grades, and the general equalization of the burdens of desegregation, are due exclusively to actions of others or circumstances or occurrences beyond the control of the School Board. The facts are otherwise. These matters are and have been within the substantial if not exclusive control of the School Board.

C. THE 1974 PLAN AND THE ORDER APPROVING IT SPECIFICALLY CONTEMPLATED THE LATER APPRAISAL AND THE MODIFICATIONS WHICH WERE MADE IN 1978.

The holding in Pasadena is by its own terms inapplicable to desegregation mandates that "call for . . . 'step at a time' plans

by definition incomplete at inception." It is also inapplicable to "a plan embodying specific revisions of the attendance zones for particular schools, as well as provisions for later appraisal of whether such discrete individual modifications had achieved the 'unitary system' required by Brown v. Board of Education." Pasadena, supra at 435.

The overwhelming weight of the record shows that the 1974 plan was composed of specific provisions known at the time to require reevaluation and, quite possibly, modification, before meaningful desegregation might be achieved, and that the court, the draftsmen of the plan, and the officials responsible for its execution, so understood it. The 1978 plan challenged by plaintiffs is the implementation (one

year late) of the 1974 commitment to re-evaluate, after three years, the specific provisions of the 1974 plan.

The 1974 plan included several broad statements of policy and guidelines to be adopted by the School Board on an interim basis in order to implement those policies. These have in large measure been outlined elsewhere in this order. That plan also contained extensive, specific revisions to the then existing pupil assignment pattern. See School Board Exhibit 3, at 8-14. The assignments were embodied in a plan breaking down attendance patterns by school and grade. See id. at 15-22.

The plan, by its terms, acknowledged the need for a later revision of those specific pupil assignments in order to comply with the constitutional mandate of

a complete and fair desegregation plan.

> "The Board of Education shall review its pupil assignment program each third year, at which times changes may be effected to maintain full utilization of school capacities at appropriate levels of integration."

Id. at 6.

As noted earlier, the court approved the 1974 plan in its order filed July 30, 1974, upon the express condition that all the guidelines and policies stated in the plan be followed and implemented. The court stated at the time that "sizeable continuing problems" remained.

One year later the court removed the Swann case from the active docket and ordered the file closed, without relinquishing jurisdiction. The court again noted the problems remaining from past active discrimination, but closed the file to provide the School Board, which

appeared to be aggressively attacking the problems, the maximum leeway within the confines of all orders of continuing effect (including the provisions of the 1974 plan).

The draftsmen of the 1974 plan were aware of its essentially incomplete character and the need for further modifications to promote full implementation of the policies and guidelines established in the plan. Ms. Margaret W. Ray, Chairman of the CAG at the time it participated with the Board of Education in formulating the 1974 plan, stated in her affidavit:

> "... An important feature of the Joint Proposal, as well as the earlier proposals of CAG, was that within three (3) years the Board would revise the pupil assignment plan in order to insure the elimination of the remaining vestiges of discrimination and the continuation of fairness and stability. CAG and the Board knew that there were certain schools in the community which would probably not be stablized under the

> joint proposal, and that there would be shifting population, the location of new schools and the necessity for some revisions to insure the best utilization of the schools. CAG wanted to avoid the necessity for annual revisions of the plan which had taken place during the period 1970-74."

Affidavit of Margaret W. Ray, at 3 (filed September 15, 1978); accord, Affidavit of Betsy Bennett (filed September 15, 1978).

The Board of Education was equally aware of the shortcomings of the 1974 plan and the need for review. Chairman Phillip O. Berry testified that at the time the plan was being approved, substantial population shifts were occurring in parts of the county. In addition, the Board heard frequent complaints that the plan did not impose equal burdens on all segments of the community. Transcript at 238-40. See also Transcript at 95 (Testimony of Dr. Wayne Church) (1978 plan was the implementation

of the 1974 plan's provision for review); Transcript at 132-36 (Testimony of Patricia M. Lowe) (1978 plan designed to improve utilization of inner city schools and equalize the burdens of desegregation [part of the Board's commitment under the 1974 plan]).

The 1978-79 plan consists principally of thirteen specific alterations in the pupil attendance patterns established by the 1974 plan. See School Board Exhibit 13. They were, in part, the result of the court approved "later appraisal" of the 1974 plan.

The court, in its discretion, left the duty of "later appraisal" with the Board and did not mandate that the Board file a report on the results of that appraisal. The court quite clearly, however, retained

jurisdiction and noted that it would consider future motions for further relief premised on any failure of the Board to abide by the commitments made in the 1974 plan.

This approach reflected the proper division of duties between court and school authority in such cases. See, e.g., Green v. County School Board, 391 U.S. 430 (1968):

> "The obligation of the district courts, as it always has been, is to assess the effectiveness of a proposed plan in achieving desegregation. There is no universal answer to complex problems of desegregation; there is obviously no one plan that will do the job in every case. The matter must be assessed in light of the circumstances present and the options available in each instance. It is incumbent upon the school board to establish that its proposed plan promises meaningful and immediate progress toward disestablishing state-imposed segregation. It is incumbent upon the district court to weigh that claim in light of the facts at hand and in light of any

> alternatives which may be shown as feasible and more promising in their effectiveness. Where the court finds the board to be acting in good faith and the proposed plan to have real prospects for dismantling the state-imposed dual system 'at the earliest practicable date,' then the plan may be said to provide effective relief. Of course, the availability to the board of other more promising courses of action may indicate a lack of good faith; and at the least it places a heavy burden upon the board to explain its preference for an apparently less effective method. Moreover, whatever plan is adopted will require evaluation in practice, and the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed."

Id. at 439 (emphasis added); accord, Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. at 21.

D. THE 1978 PLAN AND CHANGES IN PUPIL ASSIGNMENT ARE ALSO BASED UPON AN INDEPENDENT COMMITMENT OF THE SCHOOL BOARD AS A MATTER OF PUBLIC POLICY TO MAINTAIN A DESEGREGATED SCHOOL SYSTEM WITHOUT REGARD TO COURT INTERVENTION.

Independent of any court order "[the] Board of Education acted voluntarily [in

designing the 1978-79 pupil assignment plan] in accordance with its authority to operate the school system; ... if this Board of Education chose to run an integrated school system on the basis of preconceived ratios, it has that constitutional right. Like the plaintiffs in this case, the defendant relies upon the principles, plural, in the Swann case." Transcript at 16 (Opening Statement of Mr. William Sturgis, attorney for defendant School Board) (emphasis added). Counsel's statement is supported by the evidence.

In September 1977 Superintendent Robinson met with the School Board to discuss the upcoming pupil assignment revisions. At that meeting he proposed some additional guidelines to be considered

in drafting the revisions. The last sentence of the final guideline presented, in its form as adopted by the Board, stated:

> "The main goal of the Charlotte-Mecklenburg Schools is to have quality education for all students in the system."

School Board Exhibit 12.

When the staff of the school system presented the revised plan to the School Board in late 1977, it accompanied its presentation with a memorandum from Dr. Robinson, which characterized the (then) proposed plan as follows:

> "It follows the guidelines adopted by the Board and carries out the Board's commitment to an integrated school system and to a quality educational program for all students."

Added Defendants' Exhibit 6 (emphasis added) (Memorandum dated November 28, 1977).

The Board's independent commitment to the maintenance of a desegregated school

system as a component of its commitment to provide a quality educational experience for its constituents was clearly restated by Patricia M. Lowe and Phillip O. Berry, both members of the School Board when the 1978-79 plan was considered. See Transcript at 132, 245, 248-49.

A clear statement of the impact the School Board's commitment to a desegregated school system had on the formulation of the 1978-79 pupil assignment plan can be found in a colloquoy between Superintendent Robinson and counsel for defendant School Board.

> "Q. Is it fair to say that an integrated school system was a #1 priority and to the, and was restrained only by the 50 percent requirement?
>
> "A. That's right as far as I'm personally concerned, and the Board was on record on several occasions

of being committed to operating an integrated school system.

"Q. And you say you were personally concerned, and is this true with the staff, also?

"A. To the best of my knowledge and the best that I could interpret from working with the members of the staff, there was a similar commitment with the staff members I worked with.

"Q. In formulating the '78 plan, you were committed to making those moves to attain an integrated school system. Is that correct?

"A. That's correct.

"Q. And the only changes that you would have made in your recommendation to achieve that goal, absent the 50 percent Court order, would be to allow one or two schools to go to 52 percent?

"A. I would like to have had more flexibility than the 50 percent in some instances, but I would be opposed to recommending any plan that went, any of the schools going over more than a few percentage points above 50 percent."

Transcript at 226-27.

E. RACE IS ONLY ONE OF SEVERAL SIGNIFICANT FACTORS CONSIDERED BY THE BOARD AND STAFF IN PUPIL ASSIGNMENT.

Several factors were considered in making the 1978 pupil assignments. At the September 1977 meeting between Dr. Robinson and the School Board to discuss the upcoming work on the pupil assignment plan, Dr. Robinson set out the basic framework upon which the pupil assignment plan was to be built.

> "... Dr. Robinson reminded the Board that any solution to the pupil assignment plan that may be developed will be very limited in the amount of improvement it can bring to the school system because the problems involved are so interrelated that any attempt to solve one without addressing the others limits the possibility for a long-range solution. Dr. Robinson listed the following partial list of problems stating that the resolution of these problems will require carefully coordinated long-range planning:
>
> "1. We are involved with junior high school study that will probably

recommend a feasibility study of a middle school plan for our school system.

"2. Our grade organization plan is fragmented by our pupil assignment plan.

"3. Our feeder areas are complicated and difficult to understand and coordinate.

"4. We are operating many small schools that are difficult to justify economically.

"5. Several of our schools have student bodies whose students are virtually all economically deprived.

"6. Our curriculum is restricted because of lack of planning between two or more feeder areas.

"7. A lack of coordination between the school system and other community planning agencies continues to generate unnecessary problems.

***

"Dr. Robinson presented the following additional pupil assignment guidelines for the Board's consideration:

"1. Drawing of attendance lines. To the extent possible attendance lines will be drawn along natural boundaries. Where obvious inequities exist within the present plan, an effort will be

made to keep neighborhoods together in the assignment of students to a school.

"2. Utilization of schools. All schools will be utilized to the fullest extent possible. This is in keeping with the commitment by the Board 'to maintain full utilization of school capacities at appropriate ratios of racial integration' (Joint Proposal - July 1974, Specific Proposals, Item C).

"3. Assignment of children in integrated neighborhoods to the same school. Children in an integrated neighborhood will be assigned to the same school when there is not a conflict with existing guidelines. Where integrated neighborhoods exist, an effort will be made to maintain walk-in schools."

School Board Exhibit 12.

In Dr. Robinson's November 1977 memorandum to the School Board accompanying the proposed revisions, he reiterated that "The aim of the staff was to accomplish needed changes -- those related to (1) high or low ratio schools, (2) capacity,

(3) neighborhood or safety needs, etc. -- using a fairness-stability approach for the least change of students to do the job hopefully for three years or more." School Board Exhibit 10, at 4.

Both Dr. Robinson and Dr. Church reaffirmed at the hearing in this action that (a) few, if any, of the specific modifications adopted could be attributed exclusively to considerations of racial proportions in the individual schools, and (b) many changes would have been required irrespective of considerations of race. See, e.g., Transcript at 193-94 (Testimony of Dr. Robinson) (considerations of capacity, maximization of neighborhood schools, pupil safety), 201, 215 (racial proportion carried the highest priority in general but was not always

the determinant; stability and fairness were overriding concerns of the School Board and the public), 217-18 ("There are a combination of reasons involved in this assignment. It would have been very easy to make a reassignment plan based only on ratio. ... We took six months developing this plan trying to get more children nearer home, trying to better utilize the capacity of schools and trying to put the children in a safer situation; otherwise, it would be very simple just to follow ratios. That's just moving numbers around."), 196 (irrespective of race, movement in the community would have necessitated a revised pupil assignment plan in 1978); Transcript at 126 (Testimony of Dr. Church) (because of the overcrowded conditions in some of the

schools that existed prior to the adoption of the 1978 plan, the changes made for capacity reasons are not separable from the changes made for reasons of racial composition).

The 1978 plan, both in general terms and in its specific provisions, reflects this multi-faceted approach to pupil reassignment. See, e.g., School Board Exhibit 13, at 3 n.; accord, Transcript at 61-62 (Testimony of Dr. Wayne Church), 136 (Testimony of Patricia M. Lowe). The explanations in the plan of the individual changes proposed confirms the testimony of every staff and Board member who had first hand knowledge about the proposal and its adoption -- many factors, including racial composition, were brought to bear on pupil assignment decisions.

F. THE BOARD HAD LAWFUL DISCRETION TO MAKE THE ASSIGNMENTS IT DID MAKE IN 1978.

The United States Supreme Court, has clearly declared the legality of a decision by a School Board to implement a policy such as that adopted by defendant School Board:

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities. ..."

402 U.S. at 16 (emphasis added); accord, Keyes v. School District No. 1, Denver, Colorado, 413 U.S. 189, 242 (1973). (Powell, J., concurring in part and dissenting in part):

> "In a pluralistic society such as ours, it is essential that no racial minority feel demeaned or discriminated against and that students of all races learn to play, work, and coop-

> erate with one another in their common pursuits and endeavors. Nothing in this opinion is meant to discourage school boards from exceeding minimal constitutional standards in promoting the values of an integrated school experience") (emphasis added):

Offerman v. Nitkowski, 378 F. 2d 22 (2d Cir. 1967); Springfield School Committee v. Barksdale, 348 F.2d 261 (1st Cir. 1965).

The School Board's demonstrated, independent commitment to the maintenance of a desegregated school system and the implementation of that commitment through the 1978 pupil assignment plan is the type of policy decision to consider race as a factor in making pupil assignments which was contemplated by the language in Swann.

The recent decision of the Supreme Court in Regents of the University of California v. Bakke, 438 U.S. 265 (1978), is not to the contrary. Five of the nine Justices held that race may be taken into

consideration as a factor in a program of admissions to a public educational institution. See 438 U.S. at 296 n. 36 (Powell, J.), 325-26 (Brennan, White, Marshall, Blackmun, JJ). These same five Justices concluded that the state's interest in assuring a diverse student body is substantial, and in some cases compelling. See id. at 311-15 (Powell, J.), 362-63 (Brennan, White, Marshall, Blackmun, JJ). Justices Marshall, Brennan, White and Blackmun cited with approval the language quoted above from Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. at 16; see Bakke, 438 U.S. at 363.

Moreover, there are several important distinctions between the School Board's 1978-79 pupil assignment plan and the admissions program of the University of

California at Davis Medical School [U.C. Davis] challenged in Bakke. First, unlike the U.C. Davis program, considerations of race or ethnic status do not result in the disenfranchisement of any student in the system. All decisions of the School Board implemented by the 1978 pupil assignment plan relate only to placement of students at the various facilities within the system, not to their right to be placed somewhere in the system. Cf. 438 U.S. at 300 n. 39 (Powell, J.). No one has "stood in the school house door" and barred plaintiffs from an equal educational opportunity. Second, considerations of racial composition were inextricably intertwined with non-racial considerations in devising the plan. Third, as previously shown in this order, and unlike Bakke, the

1978 plan devised by the Charlotte-Mecklenburg Board did not originate against a backdrop devoid of specific judicial findings or administrative acknowledgements of the prior segregated status of the school system. It did not originate in some untutored, spontaneous, and generalized view of the public welfare. The plan is a sign of the maturation, not the metamorphosis, of the school system and its administration.

The 1978-79 pupil assignment plan as approved by the School Board, in light of the history of this school system, is well within the constitutional authority of the School Board to implement in order to fulfill its independent commitment to the operation of a desegregated school system.

G. PLAINTIFFS HAVE SHOWN NO INJURIES JUSTIFYING RELIEF.

Plaintiffs have pleaded and appeared in their individual capacities. They do not represent a class. They have not sought to be certified as representatives of a class. Plaintiffs, appearing before the court to vindicate personal rights, bear the burden under applicable precedent of demonstrating personal injury or deprivation. They have shown none.

The individual pupil assignment decisions of the 1978-79 plan were the result of a complex analysis of several factors, only some of which related to racial composition. Many of the changes made would have been made irrespective of racial considerations, because of growth and other changes in the community served by the school system. Under these

circumstances, there is considerable doubt whether there is any casual relationship between considerations of racial composition and the elements of the 1978-79 plan which affect the named plaintiffs or their wards. See Bakke, supra at 320 n. 54 (Powell, J.); Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977). Plaintiffs have failed to make any showing that improper considerations of race played a substantial part in the formulation of the components of the 1978-79 plan affecting them; they have produced no evidence whatever of any injury or harm to them from the Board's actions; and there is no indication of record that they will fare better on that issue in any further proceedings.

That other persons might hypothetically

be able to show that racial considerations played a substantial role in their reassignment under the 1978-79 plan, even if such considerations were unlawful, does not aid plaintiffs. They are the ones who instituted and shaped this litigation. They are not class representatives and are not entitled to assert the rights of others. Cf. East Texas Motor Freight System, Inc. v. Rodriguez, 431 U.S. 395 (1977).

VI.
CONCLUSION: THE CONTINUING PROBLEMS THAT REMAIN SHOULD BE LEFT IN THE HANDS OF THE SCHOOL BOARD.

When desegregation of schools was first ordered in Swann in 1969, the principal physical obstacles were the racial segregation of housing in the community and the fact that schools were located in places convenient and intended to reflect that segregation in the schools.

Those facts of life have not materially changed. Segregation of schools and housing in 1969 was the result of the organized law and financing of the state, with heavy financial help from the federal government. Any pupil assignment plan which insisted upon geography or residence or "neighborhood" as the basis of pupil assignment was bound to produce segregated schools.

The "Feeder Plan" of 1971 made things worse by taking a single school district (the city and county) and dividing it into ten administrative districts or "feeder areas" whose residents were presumptively required to attend school within their feeder areas. This plan concentrated black students into a few feeder areas, thereby adding considerably to the pressures for resegregation and, as reported above, put

over 7,500 more children on busses.

None of those circumstances has materially changed since 1969. As long as housing is segregated, schools will be segregated -- unless assignments of pupils are made and locations of schools are determined so as to keep schools from being segregated. Since more than one-fifth of the children change schools every year, it is considerably easier and cheaper and more efficient to make appropriate pupil assignments than it is to move school buildings or houses.

All the school boards since 1969 have been cool to the idea of routinely controlling pupil transfers so as to prevent schools from becoming racially identifiable. (Circumstances strongly indicate that the staff are being allowed to do this without

confessing it, but no formal instructions to the staff to do so have yet been given.) As long as there is no active routine policy to assign students and monitor transfers in aid of desegregation (when making decisions on individual requests for transfer), it will be necessary to do what the 1978 School Board did; that is, make periodic large scale adjustments which will prevent schools from becoming segregated again.

Within their self-imposed limits upon the monitoring of pupil transfers, the 1978 actions of the Board were a sound exercise in school administration and were within the authority and good judgment of the Board under the law.

Although the findings of fact on which this order is based amount to a

determination that discrimination has not been ended, no change in existing orders will be required. This order simply upholds the actions of the 1978 Board against the attacks by the plaintiffs, and leaves the continuing problems of segregation in the hands of the School Board where they belong.

It took three centuries to develop a slave culture, to fight a bloody civil war, and to live through the century of racial turmoil after that war. Although "separate but equal" is again a shibboleth apparently tempting to many high-placed people, it has not tempted the present School Board, who are standing fast in their endeavor to run the schools according to law while providing quality education. The achievement tests, now so big in educational news, show that substantial educational progress is being

made in the local schools. The fact that many black students, though showing notable improvement, don't yet do so well on those tests as others of greater advantage and income is no argument for return to segregation. It has already been noted in the Swann case that:

> "The essence of the Brown decision is that segregation implies inferiority, reduces incentive, reduces morale, reduces opportunity for association and breadth of experience, and that the segregated education itself is inherently unequal. The tests which show the poor performance of segregated children are evidence showing one result of segregation. Segregation would not become lawful, however, if all children scored equally on the tests."

318 F. Supp. 786, 794 (1970) (emphasis added).

The culture and attitudes and results of three centuries of segregation cannot be eliminated nor corrected in ten years. Human nature and practices don't change

that fast, even in the hands of people of good will like the members of the present School Board. They need time to work their own experiments, and to find their own ways of producing the sustained operation of a system of schools in which racial discrimination will play no part. I vote to uphold their efforts to date, and to give them that time.

VII.
ORDER

Based on the foregoing, which contain this court's findings of fact and conclusions of law, and on a review of the record as a whole,

IT IS ORDERED, ADJUDGED AND DECREED:

1. That plaintiffs' prayer for a temporary restraining order and injunctive relief to prevent or enjoin the implemen-

tation by defendants of the 1978-79 pupil reassignment plan is denied.

2. That counsel shall advise the court within twenty (20) days of the filing date of this order whether they desire to present any further evidence. Unless good cause is shown for additional proceedings, the court will consider the hearing already held to be consolidated with the trial of the action and shall enter a final order and judgment consistent with this opinion. See Federal Rules of Civil Procedure rule 65(a)(2).

This 10 day of August, 1979.

/s/ James B. McMillan
James B. McMillan
United States District Judge

No. 80-1149

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ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE MARTIN, *et al.*,

Petitioners,

vs.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION,

and

CARRIE L. GRAVES, *et al.*,

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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Questions Presented

1. Whether as one of their discretionary powers, school authorities may attempt as a matter of educational policy to maintain a desegregated school system by using race as a factor in making pupil assignments.

2. Whether the 1974 court approved school desegregation plan for the Charlotte-Mecklenburg Schools was implemented and a unitary system achieved.

TABLE OF CONTENTS

	Page
Questions Presented	i
TABLE OF CASES	ii
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	7
The Lower Court Decisions Do Not Conflict With The Decisions Of Other Circuits Or Of This Court	7
CONCLUSION	10

TABLE OF CASES

	Page
Booker v. Special School District No. 1, 585 F.2d 347, 351 (8th Cir. 1978) ...	8
Brown v. Board of Education, 347 U.S. 483 (1954)	6
Cuthbertson v. Charlotte-Mecklenburg Board of Education, 535 F.2d 1249 (4th Cir. 1976) cert den. 429 U.S. 831 (1976)	3
Haycraft v. Board of Education of Jefferson County, Kentucky, 560 F.2d 755 (5th Cir. 1977)	9
Lee v. Tuscaloosa City School System, 576 F.2d 37, 38 (5th Cir. 1978)	8
Moore v. Charlotte-Mecklenburg Board of Education, 402 U.S. 47 (1971)	3
Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976)	5
Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1 (1971)	2,4,7

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

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CHARLOTTE-MECKLENBURG BOARD OF EDUCATION

and

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On Petition for a Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Plaintiffs, petitioners here, a group of parents and children, brought suit against the Charlotte-Mecklenburg, North Carolina, Board of

Education seeking an order prohibiting the Board from assigning pupils pursuant to the Board's 1978 pupil assignment plan. Under that plan, out of approximately 78,000 children in the system, 2,050 white and 2,775 black children were reassigned. One reason for many of those transfers was to prevent re-segregation of certain schools. Plaintiffs contend that with the adoption and alleged implementation of the 1974 pupil assignment plan, it was impermissible thereafter for the Board to consider the race of students in making such assignments.

Carrie Graves and others were allowed to intervene as defendants on their own behalf and on behalf of a class of black pupils attending or eligible to attend the Charlotte-Mecklenburg schools. They are represented by the attorneys who represented Swann and the other plaintiffs in Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S 1 1971).

Defendant Board and intervenors argued, and the district court subsequently found that the pupil assignment plan under attack was adopted pursuant to prior orders of the district court affirmed by this Court's decision in Swann and

orders later based upon that decision, and in accordance with independent policy decisions by the School Board itself that it would maintain and operate a desegregated school system.

This is the third suit filed by the same lawyers seeking to nullify Swann.[1/] Plaintiffs in the instant case pleaded in their individual capacities; they did not claim to represent a class and did not seek to be certified as representatives of a class. S.A. 121. At the time of the evidentiary hearing no plaintiffs testified, and no live evidence was offered in their behalf. Indeed the district court noted that plaintiffs merely offered and relied upon a few written exhibits and admissions from the pleadings. S.A. 8-9. While conceding, hypothetically that other

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1/ The district court indicated in its opinion that the two prior cases, Moore v. Charlotte-Mecklenburg Board of Education, 402 U.S. 47 (1971), and Cuthbertson v. Charlotte-Mecklenburg Board of Education, 535 F.2d 1249 (4th Cir. 1976) cert. den. 429 U.S. 831 (1976), involved much the same factual contentions as made in the instant case, and were dismissed after adverse decisions. S.A. 6-7. References to "A." are to the Appendix; to "S.A." to the Separate Appendix.

persons might be able to show that racial considerations played a substantial role in their reassignment under the 1978-79 pupil assignment plan, the district court found, in fact that plaintiffs produced no evidence whatever of any injury or harm to themselves from the Board's actions. S.A. 121, 122.

In contract to the proffer of plaintiffs, defendant School Board and intervenors offered exhibits and lengthy testimony. Based on such evidence and a reexamination of the prior findings of fact and orders in Swann, the district court found that there had been no prior complete implementation of a judicial remedy relating to pupil assignment, and upheld the 1978 pupil assignment plan.[2/]

I so holding, the district court found with respect to implementation of its prior orders on pupil assignment that (1) construction, location and closing of school buildings continued to

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2/ Petitioners have suggested incorrectly that Swann was dismissed in July 1975. See 67 F.R.D. 648 (W.D. N.C. 1975).

promote segregation; (2) placement of kindergarten and elementary school grades remained discriminatory and unfair to the smallest black children; (3) failure to monitor the thousands of pupil transfers each year in the context of the "Feeder Plan" and long standing housing segregation tended to promote segregation in the schools; and (4) discriminatory burdens of desegregation remained upon the black children. The district court further found that these continuing problems were within the substantial if not exclusive control of the School Board.

On the basis of these findings the district court held inapplicable the decision in Pasadena City Board of Education v. Spangler, 427 U.S. 424 (1976), because the first essential element of a claim under Pasadena - prior complete implementation of a judicial remedy relating to pupil assignment - was obviously not present. The district court noted that Pasadena is by its own terms inapplicable to plans "embodying specific revisions of the attendance zones for particular schools, as well as provisions for later appraisal of whether such discrete individual modifications

had achieved the unitary sytem required by Brown v. Board of Education," Pasadena, supra 427 U.S. at 435. S.A. 98. The 1974 plan, the court found, upon which petitioners founded their argument that compliance had been achieved, specifically called for the later appraisal and modifications which were made in 1978.

As an alternative basis for upholding the School Board's 1978 plan, the district court found that the Board's action was based on its independent commitment as a matter of public policy to maintain a desegregated school system without regard to court intervention. S.A. 105-10; 116-17. In upholding the 1978 plan on this basis, the district court relied upon this Court's earlier decision in Swann in which such a policy was approved:

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities . . . . " 402 U.S. at 16, 91 S. Ct. at 1276.

In affirming the decision of the district court, the Fourth Circuit, rested its decision solely on the latter ground, that Pasadena was inapplicale because the School Board "is vested with broad discretionary powers over educational policy and is well within its powers when it decides that as a matter of policy schools should not have a majority of minority students. See Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S at 16." 5a. The Fourth Circuit did not consider the district court's holding that implementation of the 1974 and other plans had not yet been achieved.

REASONS FOR DENYING THE WRIT

The Lower Court Decisions Do Not Conflict With The Decisions Of Other Circuits Or Of This Court

Petitioners' reliance on Pasadena is entirely misplaced, as the district court's careful analysis of this issue makes clear. See S.A. 8-18. There the plaintiff was the local school board itself seeking relief from a district court order

requiring further rearrangements of attendance zones after having fully complied with orders providing remedies for previous racially discriminatory attendance patterns. In the instant case, however, previous racially discriminatory attendance patterns have never been remedied, and a unitary system achieved. As the meticulous and detailed analysis of the district court shows, this achievement has been foreclosed by persisting problems of construction, location and closing of school buildings which continue to promote segregation; by placement of kindergarten and elementary school grades in ways that remain discriminatory and unfair to the smallest black children; by failure of the Board to monitor and control pupil transfers, thereby tending to promote segregation in the schools; and by continuing to place a discriminatory burden of desegregation on black children. S.A. 38-115. There was thus no basis in Pasadena on which to argue that a unitary system had been achieved. See, Booker v. Special School District No. 1, 585 F.2d 343, 357 (8th Cir. 1978); Lee v. Tuscaloosa City School System, 576 F.2d 37, 38 (5th Cir.

1978); Haycraft v. Board of Education of Jefferson County, Kentucky, 560 F.2d 755 (5th Cir. 1977).

But apart from the issue of whether compliance was ever achieved with the district court's prior orders on pupil assignment, this case is different from Pasadena because the School Board has independently formulated and sought to implement through the 1978 pupil assignment plan a policy to maintain an integrated school system. As indicated, supra, such a policy was expressly approved by this Court in Swann and other cases.

> "School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorites . . . ." 402 U.S. at 16.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 80-1149

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE MARTIN, *et al*, *Petitioners*

VS.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION

AND

CARRIE L. GRAVES, *et al*,

On Petition For A Writ Of Certiorari To
The United States Court Of Appeals
For The Fourth Circuit

PETITIONERS' REPLY TO INTERVENOR DEFENDANTS' BRIEF IN OPPOSITION

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TABLE OF CONTENTS

		Page No.
I.	The Inaccuracy Of The Opposition Brief In Its Statement Of The First Question Presented -	1
II.	The Failure Of The Opposition Brief To Explain How A School Board's Exercise Of Discretion Can Be Immune To The Mandate Of Brown -	4
III.	The Failure Of The Opposition Brief To Perceive That The Petitioners' Seek Not To "Nullify" Swann, But Rely Instead Upon Obedience To Swann -	8
IV.	Miscellaneous Strange Contentions In The Opposition Brief -	11

PETITIONERS' REPLY TO THE INTERVENOR DEFENDANTS' BRIEF IN OPPOSITION

The Inaccuracy Of The Opposition Brief In Its Statement Of The First Question Presented

In opposing review of this case by this Court, the defendant intervenors[1] declare the first question "presented" to be - "whether" the defendant School Board had "discretionary" power to use "race as a factor in making pupil assignments".

While that might constitute an appropriate question in a different situation, it is not a question presented by this case. For the record in this case does not permit any hypothesis that "race" was merely "a factor" in the "making" of the

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[1] It is to be noted that the defendant School Board is not opposing review of this case by this Court.

"pupil assignments" which are here in contest. Instead, "race" and the reachieving and maintaining of a precisely defined racial ratio in each school of the Charlotte-Mecklenburg sytem was indisputably the whole cause and reason for the pupil reassignment program which the Petitioners are challenging[1].

Among the thousands of pupils, black and white, who were compulsorily moved from one school to another under this reassignment program, neither the Courts below nor the defendant School Board nor the intervenor defendants have pointed to any instance in which such movement would have been compelled or ordered, had the race of the affected children been

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[1] Petition, pp. 2-8.

different. Therefore, it is not only inappropriate, but misleading, to refer to "race" as "a factor" in this reassignment program.

The plain and undeniable truth is that the program was initiated and carried through for the explicit reason and purpose of rearranging the admixture of races in the various schools of the Charlotte-Mecklenburg system - and except for that reason and purpose would not have occurred. Race is indeed "what it was all about"[1], and the intervenor defendants' suggestion to the contrary has no support or justification.

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[1] The defendant School Board's own written documents abundantly so demonstrate. Joint Appendix in the Court of Appeals, pp. 489-514.

II.
The Failure Of The Opposition Brief To Explain How A School Board's Exercise Of Discretion Can Be Immune To The Mandate Of Brown

In its statement of the first question "presented", the opposition brief espouses and puts forward the concept which the Court of Appeals adopted as its sole ground of decision in this case, namely, that the 1978 reassignment program is impervious to constitutional attack, because it was "independently formulated" by the defendant School Board in the exercise of its "discretionary powers"[1].

As to this proposition, the opposition brief ignores the Petition's outline of the overwhelming evidence in the record, demonstrating that in reality the School

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[1] Opposition brief, pp. i, 3, 7, 9.

Board committed itself to make, and did make, the pupil reassignments here at issue - exactly to the racial ratio specifications which had been prescribed by the District Court - not "independently" and of its own "discretionary" choice, but because the Board full well realized that the District Court had previously required, and would again require, it to do so[1].

More importantly, however, the opposition brief offers no response whatever to the contention outlined in the Petition, that assignments and reassignments of public school pupils on a racial basis are not lawful and valid simply because a school board may have made or

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[1] Joint Appendix in the Court of Appeals, pp. 93, 95, 96, 377, 378, 509-512, 513, 514.

adopted them in its "educational policy discretion"[1].

The defendants and the Court below have presented this "educational policy discretion" concept as sound and correct even if there be no Swann situation requiring "remedial" or "corrective" racial assignments. The Court of Appeals' decision obviously adopts this view in its ruling that "discretionary" decision on the part of the School Board, in favor of the program of racial reassignments here at issue, validates such program, regardless of whether it is or is not required to "remedy" or "correct" former unlawful racial assignments of opposite nature.

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[1] Petition, pp. 18-21.

However, as the Petitioners have urged, Swann and Pasadena make it clear that such is not the law and that where a Swann situation does not exist - or no longer exists because of its having been remedied and corrected - then the fundamental mandate of Brown, namely, that assignments to public schools shall be "on a non-racial basis", comes again into full force and effect and bars all assigning or reassigning on a racial basis.

How can it be rationally deemed that a school board, by the exercise of an "educational policy discretion", can confer upon itself immunity to a constitutional precept which applies to all arms and agencies of both State and Federal Government, including the Courts

themselves[1]? The opposition brief makes no attempt to address this question - but surely the answer is obvious that, like the discretion or the decisions of any other governmental agency, a school board's "educational policy discretion" is in no way immune to the landmark mandate of Brown.

III.
The Failure Of The Opposition Brief To Perceive That The Petitioners' Seek Not "To Nullify" Swann, But Rely Instead Upon Obedience To Swann

The opposition brief says that this suit seeks "to nullify Swann". That, the Petitioners submit, is a thoroughly unjustified assertion. Precisely to the

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[1] To say nothing of the fact that the Charlotte-Mecklenburg School Board is a creature of North Carolina Statutes, which expressly deny to it any such immunity. Petition, pp. 20-21.

contrary, this suit relies upon the proposition that in the Charlotte-Mecklenburg school system, Swann has been respected and obeyed[1].

The exactness and the completeness with which the "corrective" racial assignments and reassignments, directed by the District Court in 1974, were put into effect throughout the Charlotte-Mecklenburg public school system, is carefully set forth in the Petition[2] - as are the circumstances bearing upon the subsequent gradual development of variances in some schools from the racial ratio which the

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[1] The opposition brief says, at its page 4, that "Petitioners have suggested incorrectly that Swann was dismissed in July 1975". On the contrary, the Petition, at page 5, recites precisely what the Swann record shows in this regard.

[2] Petition, pp. 3-5, 11-12.

District Court had prescribed for all schools[1].

Therefore, as forecast in Swann and ruled in Pasadena, the basic principle of Brown, as hereinabove emphasized, became reinstated and effective in the Charlotte-Mecklenburg school system. Consequently, repeated compulsory assignments and reassignments on the basis of race cannot continue to be imposed upon the Charlotte-Mecklenburg school children, under a misconception - steadily articulated by the District Court and apparently now accepted by the School Board - that the United States Constitution requires the Court and the Board to "maintain a continuing control over the race of children in each school,

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[1] Petition, pp. 5-8, 13-16.

such as was done for many decades before Brown vs. Board of Education"[1].

This misconception, it must be noted, is studiously ignored in the opposition brief and is essentially the same as that enunicated by the District Court, and repudiated by this Court, in Pasadena.

IV.
Miscellaneous Strange Contentions In The Opposition Brief

The intervenor defendants seem to view critically, or condescendingly, the fact that "Plaintiffs in the instant case pleaded in their individual capacities; they did not claim to represent a class and did not seek to be certified as representative of a class"[2]. It is hardly,

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[1] Petition, pp. 16-17.

[2] Brief in opposition, p. 3.

however, a badge of demerit that the Petitioners have seen fit to raise their claims of constitutional right directly and individually, rather than proceed through the indirections and ambiguities of an alleged "class" action.

Next, the opposition brief speaks deprecatingly of the fact that at the "evidentiary hearing" in this case, the plaintiffs did not testify, "and no live evidence was offered in their behalf"[1].

The plaintiffs were well aware, however, that the evidence ncessary to support their allegations would have to come - as it amply did in fact - from cross-examination of School Board members and School Board officials and staff

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[1] Brief in opposition, p. 3.

personnel, and from School Board and other public documents and records, and from Court papers in the Swann case and in the present case. Since the record that was developed speaks for itself, it is difficult to perceive just what is the point that the opposition brief purports to make in this regard.

Further, along such vein, the opposition brief seems to take the position that the Petitioners have no case, because they "produced no evidence whatever of any injury or harm to themselves".

Yet the Complaint alleges that the plaintiffs' minor children, because of their race and color, have been uprooted from the schools which they otherwise would have attended, and have been compulsorily moved here and there among

the schools of the Charlotte-Mecklenburg system, and that under the further circumstances of this case, this was a violation of rights guaranteed to the plaintiffs by the United States Constitution. The plaintiffs have certainly "produced evidence" in support of these allegations.

Yet the opposition brief seems to be asserting that anything thus alleged or shown would still not establish "any injury or harm to" the plaintiffs. Does the opposition brief intend to be saying that violation of a citizen's constitutional right does not constitute "any injury or harm to" him?

Finally, the opposition brief declares that "Petitioners' reliance on Pasadena is entirely misplaced", because "there the plaintiff was the local school board itself

seeking relief from a district court order requiring further rearrangements of attendance zones after having fully complied with orders providing remedies for previously racially discriminatory attendance patterns", and that "in the instant case, however, previous racially discriminatory attendance patterns have never been remedied, and a unitary system achieved".

The opposition brief seems to overlook the fact that in Pasadena this Court said, as more fully quoted in the Petition, that:

> "It may well be that Petitioners have not yet totally achieved the unitary system contemplated by this quotation from Swann . . . But that does not undercut the force of the principle underlying the quoted

language from Swann"[1].

Moreover, in the present case, the Petitioners need not struggle with the generalities and uncertainties as to whether or when a "unitary system" has been achieved. For, in this case, the District Court made its requirements completely specific: - that blacks should be assigned to each school, but should not constitute more than 50 per cent of the student body in any school - and how many blacks and how many whites were to go from what schools and to what schools - and what would be the resulting numbrs and percentages of blacks and of whites in each school.

Likewise, in the present case, it cannot be denied, and is not denied, that

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[1] Petition, p. 10.

the racial assignments and reassignments designated and specified by the District Court were put into effect in the Charlotte-Mecklenburg schools, and that the racial ratios prescribed by that Court were thereby brought about in each and all of these schools.

As to the opposition brief's emphasizing the fact that in Pasadena, "the plaintiff was the local school board itself seeking relief", it is difficult to discern what comfort the intervenor defendants derive from that circumstance, in comparison to the present situation.

For in the present case, the plaintiffs are themselves the possessors of the asserted constitutional rights, the violation of which is the basis of this action. In Pasadena, by contrast, the

plaintiff school board stood in lesser and derivative position with respect to the fundamental rights for which protection was sought. As emphasized by this Court in Shelley vs. Kraemer:

> "The rights created by the First Section of the Fourteenth Amendment are by its terms, guaranteed to the individual. The rights established are personal rights".
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> Shelley vs. Kraemer, 334 U.S. 1, 22, 68 S.Ct. 836, 92 L.Ed 1161, 1185 (1948)

Upon all of the foregoing, the Petitioners respectfully renew their prayer for the issuance of a Writ of Certiorari in this case.

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